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CHAPTER 9

# *Election Contests*

**A. In General**

§ 1. Constitutional Provisions; Historical Background
§ 2. Contested Election Laws
§ 3. State or Local Election Boards

**B. Jurisdiction and Powers**

§ 4. The House
§ 5. Election Committees
§ 6. The Clerk; Transmittal of Papers
§ 7. The Courts

**C. Grounds of Contest**

§ 8. Generally
§ 9. Faulty Credentials; Citizenship
§ 10. Violation of Federal or State Election Laws
§ 11. Improper Attempts to Influence or Confuse Voters
§ 12. Voting Booth and Balloting Irregularities

**D. Defenses**

§ 13. Generally
§ 14. Contestant's Credentials and Qualifications
§ 15. Abatement
§ 16. Limitations and Laches

**E. Practice and Procedure**

§ 17. Alternatives to Statutory Election Contests
§ 18. Commencing the Contest

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**Commentary and editing by John Theodore Fee, J.D.**

§ 19. Parties

**F. Notice of Contest**

§ 20. Generally; Time
§ 21. Service of Notice
§ 22. Form and Contents of Notice

**G. Pleading**

§ 23. Generally
§ 24. Answer
§ 25. Motion to Dismiss
§ 26. Motion for More Definite Statement

**H. Taking of Testimony; Depositions**

§ 27. Generally; Time
§ 28. Examination of Parties and Witnesses
§ 29. Scope of Examination; Objections
§ 30. Subpenas
§ 31. Affidavits

**I. Committee Hearing and Review; Dismissal and Withdrawal**

§ 32. Generally; Preparation of Briefs
§ 33. Dismissal and Withdrawal of Contest

**J. Evidence**

§ 34. Generally
§ 35. Burden of Proof
§ 36. Presumptions
§ 37. Ballots
§ 38. Determination of Voter Intention

**K. Inspection and Recount of Ballots**

§ 39. Generally
§ 40. Grounds

§ 41. Procedure

**L. Disposition of Contests; Resolutions**

§ 42. Generally
§ 43. Committee Reports
§ 44. Form of Resolutions
§ 45. Costs and Expenses; Compensation and Allowances

**M. Summaries of Election Contests, 1931–72**

§ 46. Seventy-second Congress, 1931–32
§ 47. Seventy-third Congress, 1933–34
§ 48. Seventy-fourth Congress, 1935–36
§ 49. Seventy-fifth Congress, 1937–38
§ 50. Seventy-sixth Congress, 1939–40
§ 51. Seventy-seventh Congress, 1941–42
§ 52. Seventy-eighth Congress, 1943–44
§ 53. Seventy-ninth Congress, 1945–46
§ 54. Eightieth Congress, 1947–48
§ 55. Eighty-first Congress, 1949–50
§ 56. Eighty-second Congress, 1951–52
§ 57. Eighty-fifth Congress, 1957–58
§ 58. Eighty-sixth Congress, 1959–60
§ 59. Eighty-seventh Congress, 1961–62
§ 60. Eighty-eighth Congress, 1963–64
§ 61. Eighty-ninth Congress, 1965–66
§ 62. Ninetieth Congress, 1967–68
§ 63. Ninety-first Congress, 1969–70
§ 64. Ninety-second Congress, 1971–72

**Appendix**

Election Contests, 1917–31

INDEX TO PRECEDENTS

**Abernethy et al. v Wheadon et al., Mississippi 1965, § 61.2**
**Advisory opinions as to state law, §§ 5.13, 5.14**
**Alford, investigation of right to seat, Arkansas 1959, § 58.1**
**Alternatives to statutory election contests, §§ 17.1–17.4**
**Answer, failure to make timely, § 24.1**
**Ayres v Huber, Ohio 1951, § 56.1**
**Ballot boxes, magistrate's authority to open, § 7.7**
**Balloting irregularities, §§ 12.2–12.8**
**Ballots**
ambiguous, interpretation of voter intention, § 37.1
best evidence for determining voter intention, § 37.2
committee power to examine and recount, §§ 5.10, 5.11
integrity of, preserving, §§ 5.7, 5.8, 35.10, 37.19, 37.20
interpretation of voter intention, §§ 38.1–38.3
marked for both candidates, § 37.15
marked in wrong place, § 37.16
marked with improper instrument, § 37.18
marked with other than specified mark, §§ 37.10, 37.11
"papers" required to be produced, §§ 29.2, 29.3
preservation of, §§ 5.7, 5.8, 35.10, 37.19, 37.20
recount by stipulation of parties, §§ 39.1, 39.2
recount conducted by federal auditors, § 41.5
recount justified only if election result affected. §§ 40.5–40.7
recount of, burden of proof to show fraud or mistake before, §§ 40.3, 40.4
**Ballots—Cont.**
recount supervised by House, § 39.4
recount, unsupervised, § 39.3
stickers used in lieu of writing in name, §§ 37.13, 37.14
stub attached to, § 37.17
tallies, § 37.21
"write in," misspelling name on, § 37.12
writing in name of already listed candidate, effect of, § 37.9
**Beck v Shanahan, Pennsylvania 1934, § 47.15**
**Blackburn v Mackay, Georgia 1967, § 62.2**
**Blackney v Stevens, Michigan 1949, § 55.3**
**Booth, see Voting booth**
**Bowles v Dingell, Michigan 1934, § 47.1**
**Brewster v Utterback, Maine 1933, § 47.2**
**Britten v McAndrews, Illinois 1934, § 47.12**
**Browner v Cunningham, Iowa 1949, § 55.1**
**Burden of proof** (see also **Presumptions**)
claim to seat, establishing, § 35.8
expenditures, allegations of improper, § 35.9
recount of ballots, fraud or mistake shown before, §§ 40.3, 40.8
results of election would be changed, §§ 35.3–35.7, 40.5–40.7
**Burnham v Chandler, California 1934, § 47.4**
**Campaign workers, prizes to, as grounds for contest, § 11.4**
**Candidate's participation in irregularities, § 13.2**
**Carter v LeCompte, Iowa 1957, § 57.1**

**Casey v Turpin, Pennsylvania 1934, § 47.3**
**Certificates of election, §§ 9.1–9.3**
**Chambers or Roush, Indiana 1961, § 59.1**
**Chandler v Burnham, California 1934, § 47.4**
**Citizenship, Member's qualifications as to, § 9.4**
**Clark v Nichols, Oklahoma 1943, § 52.1**
**Clerk**
items transmitted to Speaker, §§ 6.1–6.5
notice of contest to, forwarding in prescribed manner of, § 25.1
powers of, §§ 6.6–6.13
subpena, refusal to respond to party's, §§ 6.13, 30.1
testimony, failure to forward to Clerk, § 27.6
**Coad v Dolliver, Iowa 1957, § 57.2**
**Colmer v Gray, Mississippi 1965, § 61.2**
**Contestant**
failure to specify grounds relied upon, § 13.8
standing to bring contest, §§ 14.1, 19.1–19.6
**Contingent fund, reimbursement of contest expenses from, §§ 45.1, 45.2**
**Cooper v Miller, Ohio 1936, § 48.3**
**Corrupt Practices Act, §§ 10.1–10.5**
**Cosey et al. v Williams, Mississippi 1965, § 61.2**
**Coyle v Kent, Pennsylvania 1932, § 46.1**
**Cunningham v Browner, Iowa 1949, § 55.1**
**Curtis v Karst, Missouri 1951, § 56.2**
**Davies v Fuller, New York 1949, § 55.2**
**Davis v Lowe, Georgia 1948, § 54.1**
**Davis v Lowe, Georgia 1951, § 56.3**
**Davis v Mankin, Georgia 1947, § 54.2**
**Debate on resolution disposing of contest**
extension of time for, § 42.9
participation by parties, §§ 42.6, 42.7
**Default judgment, motion for, § 23.2**
**Deposition unsigned by witness, § 28.1**
**Devine v Walker. Mississippi 1965, § 61.2**
**Dingell v Bowles, Michigan 1934, § 47.1**
**Directed verdict, motion for, § 23.1**
**Directory laws distinguished from mandatory laws, §§ 10.6–10.12**
**Dismiss, premature motion to, § 25.6**
**Dismissal, cause for, § 33.1**
**Disney v O'Connor, Oklahoma 1932, § 46.3**
**Disposal of contest**
parties' stipulation as to, § 42.10
privileged resolutions, §§ 42.2–42.5
resolution declaring seat vacant, §§ 42.11, 42.12
**Dolliver v Coad, Iowa 1957, § 57.2**
**Dondero v Hicks, Michigan 1945, § 53.1**
**Douglas v Roberts, California 1947, § 54.4**
**Eaton v Scott, California 1940, § 50.2**
**Election official**
directory laws, violations of, §§ 10.8, 10.10
mandatory laws, violations of, § 10.7
violations and errors by, §§ 10.13–10.15
voter confusion as excuse for entering booth, § 12.1
**Elections**
conducted improperly, §§ 10.17–10.19
illegal, as grounds for contest, §§ 10.18, 14.2
unauthorized, § 14.2
**Ellenbogen, In re, Pennsylvania 1933, § 47.5**

**Ellis v Thurston, Iowa 1934, § 47.6**
**Ellzey v Reese, Mississippi 1934, § 47.13**
**Evidence (**see also **Burden of proof; Presumptions)**
ballots as best evidence, § 37.2
ex parte proceedings, § 34.3
future use, collecting for, § 34.1
preservation of, by committee, §§ 5.7–5.9
production of contestant's, § 34.2
standard of "air preponderance," § 35.2
testimony from prior state inquiry, § 34.4
withdrawal of, § 32.1
**Expenses of election contests, see Reimbursement of contest expenses**
**"Fair preponderance" of evidence standard, § 35.2**
**Feighan v Thierry, Ohio 1949, § 55.4**
**Felix v Muldowney, Pennsylvania 1934, § 47.7**
**Financing extra editions of magazine as grounds for contest, § 11.2**
**Fox v Higgins, Connecticut 1934, § 47.8**
**Frankenberry v Ottinger, New York 1965, § 61.1**
**Fuller v Davies, New York 1949, § 55.2**
**Funds, illegal use of, § 10.20**
**Gormley v Goss, Connecticut 1934, § 47.9**
**Goss v Gormley, Connecticut 1934, § 47.9**
**Granata v Kunz, Illinois 1932, § 46.2**
**Granger v Wilson, Utah 1948, § 54.5**
**Gray v Colmer, Mississippi 1965, § 61.2**
**Greenwood v Macy, New York 1951, § 56.4**
**Gross v Peterson, Iowa 1965, § 61.3**
**Hale v Oliver, Maine 1958, § 57.3**
**Hamer v Whitten, Mississippi 1965, § 61.2**
**Harrington v Swanson, Iowa 1940, § 50.4**
**Hicks v Dondero, Michigan 1945, § 53.1**
**Higgins v Fox, Connecticut 1934, § 47.8**
**House resolution disposing of contest, see Resolutions disposing of contest**
**Huber v Ayres, Ohio 1951, § 56.1**
**Illegal elections, §§ 10.17–10.19, 14.2**
**Illegal use of funds, § 10.20**
**Invalid elections, see Elections**
**Investigations continuing after adjournment**
authority for, § 5.12
funding for, § 45.1
**Investigations of right to seat, see Alternatives to statutory election contest**
**Jenks v Roy, New Hampshire 1938, § 49.1**
**Joint resolution**
reimbursement of contest expenses authorized by, § 45.3
**Jurisdiction, notice of contest as basis for House, § 4.1**
**Karst v Curtis, Missouri 1951, § 56.2**
**Kefauver v Neal, Tennessee 1940, § 50.1**
**Kemp, Sanders investigation, Louisiana 1934, § 47.14**
**Kent v Coyle, Pennsylvania 1932, § 46.1**
**King v McCandless, Hawaii 1936, § 48.2**
**Kirwan v Miller, Ohio 1941, § 51.1**
**Kunz v Granata, Illinois 1932, § 46.2**
**Laches, defense to contest, § 16.1**
**LaGuardia v Lanzetta, New York 1934, § 47.10**
**Lanzetta v LaGuardia, New York 1934, § 47.10**

**Lanzetta v Marcantonio, New York 1936, § 48.1**
**LeCompte v Carter, Iowa 1957, § 57.1**
**Lovette v Reece, Tennessee 1934, § 47.11**
**Lowe v Davis, Georgia 1948, § 54.1**
**Lowe v Davis, Georgia 1951, § 56.3**
**Lowe v Thompson, Georgia 1967, § 62.1; 1969, § 63.1**
**Maas v Williams, Minnesota 1937, § 49.3**
**Mackay v Blackburn, Georgia 1967, § 62.2**
**Macy v Greenwood, New York 1951, § 56.4**
**Mahoney v Smith, Kansas 1959, § 58.2**
**Mandatory laws distinguished from directory laws, §§ 10.6–10.12**
**Mankin v Davis, Georgia 1947, § 54.2**
**Marcantonio v Lanzetta, New York 1936, § 48.1**
**McAndrews v Britten, Illinois 1934, § 47.12**
**McCandless v King, Hawaii 1936, § 48.2**
**McEvoy v Peterson, Georgia 1944, § 52.2**
**McMurray v Thill, Wisconsin 1944, § 52.6**
**Members on subcommittee on elections, qualifications of, § 5.4**
**Memorial, see Alternatives to statutory election contest**
**Michael v Smith, Virginia 1947, § 54.3**
**Miller v Cooper, Ohio 1936, § 48.3**
**Miller v Kirwan, Ohio 1941, § 51.1**
**Miller v Sullivan, Missouri 1943, § 52.5**
**Minority reports, §§ 43.7–43.9**
**Mississippi, The Five Cases of, 1965, § 61.2**
**Moreland v Schuetz, Illinois 1943, § 52.3**
**Motion for directed verdict, § 23.1**
**Motion for default judgment, § 23.2**
**Motion to dismiss, premature, § 25.6**
**Muldowney v Felix, Pennsylvania 1934, § 47.7**
**Myers v Springer, Illinois 1959, § 58.3**
**Neal v Kefauver, Tennessee 1940, § 50.1**
**Nichols v Clark, Oklahoma 1943, § 52.1**
**Notice of contest**
commencement of 30-day period for filing, § 20.5
good-faith requirement in filing for reimbursement of expenses, § 45.7
signature, necessity of, § 22.4
**Oath, administration of, as evidence of right to seat, § 35.1**
**Oath, administration of candidate's, §§ 4.2, 4.3**
**O'Brien v Woodward, Illinois 1947, § 54.6**
**O'Connor v Disney, Oklahoma 1932, § 46.3**
**Odegard v Olson, Minnesota 1963, § 60.1**
**Oliver v Hale, Maine 1958, § 57.3**
**Olson v Odegard, Minnesota 1963, § 60.1**
**Osser v Scott, Pennsylvania 1951, § 56.5**
**Ottinger v Frankenberry, New York 1965, § 61.1**
**Petition of right to seat, see Alternatives to statutory election contest**
**Peterson v Gross, Iowa 1965, § 61.3**
**Peterson v McEvoy, Georgia 1944, § 52.2**
**Plunkett, In re, 1945, § 53.2**
**Polk v Smith, Ohio 1939, § 50.3**
**Pre-election irregularities**
courts, appeal to state, § 7.1
**Presumptions** (see also **Burden of proof**)
absence of witnesses and challengers for contestant, § 36.8

**Presumptions** (see also **Burden of proof**)**—Cont.**
closeness of election result, § 36.11
official returns as prima facie evidence, §§ 36.1–36.7
tally sheets, correctness of, § 36.9
**Primary election, improperly conducted, § 10.19**
**Privileged resolutions, disposing of contests, §§ 42.2–42.5**
**Prizes to campaign workers as grounds for contest, § 11.4**
**Racial discrimination as grounds for contesting election, § 11.3**
**Recount of ballots**
burden on contestant to produce evidence justifying, § 41.3
burden on contestant to show fraud or mistake before, § 40.3
conducted by auditors from General Accounting Office, § 41.5
court, state, recount supervised by, § 39.6
exhaustion of state remedies before, § 41.1
House supervision, held pursuant to state law, § 39.4
joint applications for, § 41.4
reconsideration of actions ordering, § 41.6
result of election be affected in order to justify, § 39.5
stipulation of parties to, §§ 39.1, 39.2
unsupervised, § 39.3
**Reece v Lovette, Tennessee 1934, § 47.11**
**Reese v Ellzey, Mississippi 1934, § 47.13**
**Reimbursement of expenses or allowances**
abatement of contest, request made after, § 45.6
alternatives to statutory election contests, reimbursement to parties in, § 45.4
**Reimbursement of expenses or allowances—Cont.**
good-faith filing, conditioned upon, § 45.7
House contingent fund, payments from, § 45.1, 45.2
joint resolution authorizing, § 45.3
parties' expenses, § 45.4
retroactive to convening of Congress for Member-elect, § 45.5
**Reports on contest by committee**
failure to submit to House, §§ 43.13, 43.14
minority, §§ 43.7–43.9
resolutions accompanying, § 43.4
timeliness of, §§ 43.5, 43.6
withdrawal of contest by contestant, reciting, §§ 43.10, 43.12
**Representatives on subcommittee on elections, qualifications of, § 5.4**
**Residency, commencement, determined by state court, § 7.4**
**Resolutions disposing of contest**
admitting neither candidate to seat, § 42.15
debate upon, extensions of, § 42.9
debate upon, participation of parties in, §§ 42.6–42.8
declaring seat vacant, §§ 42. 11, 42.12
form of resolution, §§ 44.1–44.3
language in, appropriateness of, § 44.1
privileged, § 42.2–42.5
several contests treated in same resolution, § 44.3
substitutes to, offering of, § 42.17, 42.18
**Roberts v Douglas, California 1947, § 54.4**
**Roush or Chambers. Indiana 1961. 59.1**
**Roy v Jenks, New Hampshire 1938, § 49.1**
**Rutherford v Taylor, Tennessee 1937, § 49.2**

**Sanders, Kemp investigation, Louisiana 1934, § 47.14**
**Schafer v Wasielewski, Wisconsin 1944, § 52.4**
**Schuetz v Moreland, Illinois 1943, § 52.3**
**Scott v Eaton, California 1940, § 50.2**
**Scott v Osser, Pennsylvania 1951, § 56.5**
**Service, substituted, § 21.1**
**Shanahan v Beck, Pennsylvania 1934, § 47.15**
**Signature necessary on notice of contest, § 22.4**
**Simpson v Weber, Illinois 1934, § 47.16**
**Smith v Mahoney, Kansas 1959, § 58.2**
**Smith v Michael, Virginia 1947, § 54.3**
**Smith v Polk, Ohio 1939, § 50.3**
**Springer v Myers, Illinois 1959, § 58.3**
**Standing**
contestant's, to bring contest, §§ 14.1, 19.1–19.6
third party's, to bring contest, §§ 19.1–19.3
**State law**
advisory opinions by state courts on, § 7.3
advisory opinions by state officials on, § 5.13
court, local, adoption or rejection of opinion of, §§ 7.4–7.6, 38.4
nominating procedure, illegal, § 10.21
voter intention as paramount consideration, § 38.4, 38.5
**State or local elections, intervention in, § 3.2**
**State remedy, effect of failure to exhaust, §§ 13.4, 13.5**
**Stevens v Blackney, Michigan 1949, § 55.3**
**Stickers, see Ballots**
**Stipulation of parties**
disposal of contest by, § 42.10
**Stipulation of parties—Cont.**
jurisdiction on Congress, as to conferring, § 4.1
recount of ballots, joint applications for, § 41.4
time, extensions of, § 27.15
**"Straight ticket" votes, interpretation of, § 37.6–37.8**
**Stubs, see Ballots**
**Subpena**
Clerk's refusal to respond to, § 30.1
noncompliance with, § 30.2
**Substituted service, see Service**
**Sullivan v Miller, Missouri 1943, § 52.5**
**Swanson v Harrington, Iowa 1940, § 50.4**
**Tally sheets, presumption of correctness of, § 36.9**
**Taylor v Rutherford, Tennessee 1937, § 49.2**
**Testimony** (see also **Evidence**)
Clerk, failure to forward to, § 25.1, 27.6
failure to produce, § 29.1
failure to take within statutory period, §§ 15.1–15.3, 27.1–27.5
time, extensions of for taking, §§ 27.7–27.10
**Thierry v Feighan, Ohio 1949, § 55.4**
**Thill v McMurray, Wisconsin 1944, § 52.6**
**Thompson v Lowe, Georgia 1967, § 62.1; 1969, § 63.1**
**Thurston v Ellis, Iowa 1934, § 47.6**
**Time**
extension by stipulation of parties of, § 27.15
extension during debate on resolution disposing of contest of, § 42.9
extension only for good cause of, §§ 27.11, 27.12
extension, subsequent authorization of, § 27.14

**Transmittal of papers, see Clerk**
**Tunno v Veysey, California 1971, § 64.1**
**Turpin v Casey, Pennsylvania 1934, § 47.3**
**Utterback v Brewster, Maine 1933, § 47.2**
**Vacancy, notification to Governor of, § 4.6**
**Veysey v Tunno, California 1971, § 64.1**
**Voter intention, state law as related to interpreting, §§ 38.4, 38.5**
**Voters, confusing or misleading as grounds for contest, § 11.1**
**Votes, see Ballots**
**Voting booth**
election official entering, voter confusion as excuse for, § 12.1
**Walker v Devine, Mississippi 1965, § 61.2**
**Wasielewski v Schafer, Wisconsin 1944, § 52.4**
**Weber v Simpson, Illinois 1934, § 47.16**
**Wheadon et al. v Abernethy et al., Mississippi 1965, § 61.2**
**Whitten v Hamer, Mississippi 1965, § 61.2**
**Williams v Cosey et al., Mississippi 1965, § 61.2**
**Williams v Maas, Minnesota 1937, § 49.3**
**Wilson v Granger, Utah 1948, § 54.5**
**Withdrawal of contest, §§ 33.3–33.6**
**Witness, signing of deposition by, § 28.1**
**Woodward v O'Brien, Illinois 1947, § 54.6**
**"Write in" votes, see Ballots**

# *Election Contests*

## A. IN GENERAL

### § 1. Constitutional Provisions; Historical Background

This chapter sets forth the substantive and procedural aspects of an election contest brought to determine the right to a seat in the House. Emphasis is placed on contests initiated by defeated candidates, known as contestants. In the style of an election contest, the contestant's name is always given first.

The format of this chapter differs in some respects from other chapters in this work. Following each precedent is a brief note identifying the election contest involved and a reference to the complete account of the contest. A comprehensive review of each contest will be found in the last division of this chapter (§§ 46 et seq.).

An appendix to this chapter has been included to cover election contests during the 65th through the 71st Congresses (1917–1931). It was thought necessary to include these cases even though outside the normal scope of these volumes, because no substantial coverage now exists of election contests during that period.[1]

Election contests are to be distinguished from proceedings by the House to exclude or expel a Member, and from suits brought by an elector of the Member's district.[2]

Under section 4 of article I of the United States Constitution, the times, places, and manner of holding elections for Representatives shall be prescribed in each state by the legislature thereof but the Congress may at any time by law make or alter such regulations. As noted elsewhere in this work (see Chapter 8, supra), Congress has designated the date pursuant to that provision on which

1. For election contests considered prior to the 72d Congress, see, in addition to the appendix to this chapter, 1 Hinds' Precedents §§ 634–844, 2 Hinds' Precedents §§ 845–1135, 6 Cannon's Precedents §§ 90–189, 7 Cannon's Precedents §§ 1721, 1722.

2. Exclusion or expulsion proceedings, see Ch. 12, infra. Memorials and other alternatives to statutory election contests are briefly treated in § 17, infra. See also Ch. 8, supra, which includes a discussion of elections and election regulations.

the elections for Representatives are to be held. Congress also by statute requires that all votes for Representatives in Congress be by written or printed ballot, or by voting machine, the use of which has been duly authorized by the state law (2 USC §§ 7, 9).

Under section 5 of article I of the Constitution, it is provided: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ."

Recently, in *Roudebush* v. *Hartke*, 405 U.S. 15 (1972), the Court characterized the question of title to a seat in Congress as a "nonjustifiable political question." [3]

The extent to which a violation of the Corrupt Practices Act, 2 USC §§ 241–256 (repealed), provided grounds for an election contest is discussed herein [4] but the limitations on campaign expenditures set forth in that statute are treated elsewhere in this work.[5]

## § 2. Contested Election Laws

Contests for seats in the House of Representatives are governed by the Federal Contested Elections Act. This statute (2 USC §§ 381–396) sets forth the procedure by which a defeated candidate may have his claim to a seat adjudicated by the House. The act provides for the filing of notice of contest and other proceedings (§§ 20–26, infra), for the taking of testimony of witnesses (§§ 27–31, infra), and for a hearing on the depositions and other papers (§§ 32, 33, infra) that have been filed with the Clerk (§ 6, infra). The contest is heard by the Committee on House Administration (§ 5, infra). Acting upon committee reports, the House, by privileged resolution, then disposes of the case by declaring one of the parties to be entitled to the seat (§ 44, infra).

The act (Public Law 91–138) provides as follows:

**3.** Congress has always regarded itself as the final judge of elections. For example, the Committee on House Administration, in a report dated May 24, 1972 (H. Rept. No. 92–1090), stated: "It is the committee's feeling that once the final returns in any election have been ascertained, the determination of the right of an individual to a seat in the House of Representatives is in the sole and exclusive jurisdiction of the House of Representatives under [section 5 of article I, Constitution of United States]."

**4.** See § 10, infra.

**5.** See Ch. 8, supra. The Corrupt Practices Act has been replaced by the Federal Election Campaign Act of 1971, 2 USC §§ 431 et seq.

SHORT TITLE

Section 1. This Act may be cited as the "Federal Contested Election Act".

DEFINITIONS

Sec. 2. For purposes of this Act—

(a) The term "election" means an official general or special election to chose a Representative in or Resident Commissioner to the Congress of the United States, but does not include a primary election, or a caucus or convention of a political party.

(b) The term "candidate" means an individual (1) whose name is printed on the official ballot for election to the House of Representatives of the United States, or (2) notwithstanding his name is not printed on such ballot, who seeks election to the House of Representatives by write-in votes, provided that he is qualified for such office and that, under the law of the State in which the congressional district is located, write-in voting for such office is permitted and he is eligible to receive write-in votes in such election.

(c) The term "contestant" means an individual who contests the election of a Member of the House of Representatives of the United States under this Act.

(d) The term "contestee" means a Member of the House of Representatives of the United States whose election is contested under this Act.

(e) The term "Member" means an incumbent Representative in or Resident Commissioner to the Congress of the United States, or an individual who has been elected to either of such offices but has not taken the oath of office.

(f) The term "Clerk" means the Clerk of the House of Representatives of the United States.

(g) The term "committee" means the Committee on House Administration of the House of Representatives of the United States.

(h) The term "State" includes territory and possession of the United States.

(i) The term "write-in vote" means a vote cast for a person whose name does not appear on the official ballot by writing in the name of such person on such ballot or by any other method prescribed by the law of the State in which the election is held.

NOTICE OF CONTEST

Sec. 3. (a) Whoever, having been a candidate for election to the House of Representatives in the last preceding election and claiming a right to such office, intends to contest the election of a Member of the House of Representatives, shall, within thirty days after the result of such election shall have been declared by the officer or Board of Canvassers authorized by law to declare such result, file with the Clerk and serve upon the contestee written notice of his intention to contest such election.

(b) Such notice shall state with particularity the grounds upon which contestant contests the election and shall state that an answer thereto must be served upon contestant under section 4 of this Act within thirty days after service of such notice. Such notice shall be signed by contestant and verified by his oath or affirmation.

(c) Service of the notice of contest upon contestee shall be made as follows:

(1) by delivering a copy to him personally;

(2) by leaving a copy at his dwelling house or usual place of abode with a person of discretion not less than sixteen years of age then residing therein;

(3) by leaving a copy at his principal office or place of business with some person then in charge thereof;

(4) by delivering a copy to an agent authorized by appointment to receive service of such notice; or

(5) by mailing a copy by registered or certified mail addressed to contestee at his residence or principal office or place of business. Service by mail is complete upon mailing;

(6) the verified return by the person so serving such notice, setting forth the time and manner of such service shall be proof of same, and the return post office receipt shall be proof of the service of said notice mailed by registered or certified mail as aforesaid. Proof of service shall be made to the Clerk promptly and in any event within the time during which the contestee must answer the notice of contest. Failure to make proof of service does not affect the validity of the service.

ANSWER; DEFENSES MADE BY MOTION

Sec. 4. (a) Any contestee upon whom a notice of contest as described in section 3 shall be served, shall, within thirty days after the service thereof, serve upon contestant a written answer to such notice, admitting or denying the averments upon which contestant relies. If contestee is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this shall have the effect of a denial. Such answer shall set forth affirmatively any other defenses, in law or fact, on which contestee relies. Contestee shall sign and verify such answer by oath or affirmation.

(b) At the option of contestee, the following defenses may be made by motion served upon contestant prior to contestee's answer:

(1) Insufficiency of service of notice of contest.

(2) Lack of standing of contestant.

(3) Failure of notice of contest to state grounds sufficient to change result of election.

(4) Failure of contestant to claim right to contestee's seat.

(c) If a notice of contest to which an answer is required is so vague or ambiguous that the contestee cannot reasonably be required to frame a responsive answer, he may move for a more definite statement before interposing his answer. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the committee is not obeyed within ten days after notice of the order or within such other time as the committee may fix, the committee may dismiss the action, or make such order as it deems just.

(d) Service of a motion permitted under this section alters the time for serving the answer as follows, unless a different time is fixed by order of the committee: If the committee denies the motion or postpones its disposition until the hearing on the merits, the answer shall be served within ten days after notice of such action. If the committee grants a motion for a more definite statement the answer shall be served within ten days after service of the more definite statement.

SERVICE AND FILING OF PAPERS OTHER THAN NOTICE OF CONTEST; HOW MADE; PROOF OF SERVICE

Sec. 5. (a) Except for the notice of contest, every paper required to be

served shall be served upon the attorney representing the party, or, if he is not represented by an attorney, upon the party himself. Service upon the attorney or upon a party shall be made:

(1) by delivering a copy to him personally;

(2) by leaving it at his principal office with some person then in charge thereof; or if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with a person of discretion not less than sixteen years of age then residing therein; or

(3) by mailing it addressed to the person to be served at his residence or principal office. Service by mail is complete upon mailing.

(b) All papers subsequent to the notice of contest required to be served upon the opposing party shall be filed with the Clerk either before service or within a reasonable time thereafter.

(c) Papers filed subsequent to the notice of contest shall be accompanied by proof of service showing the time and manner of service, made by affidavit of the person making service or by certificate of an attorney representing the party in whose behalf service is made. Failure to make proof of service does not affect the validity of such service.

DEFAULT OF CONTESTEE

Sec. 6. The failure of contestee to answer the notice of contest or to otherwise defend as provided by this Act shall not be deemed an admission of the truth of the averments in the notice of contest. Notwithstanding such failure, the burden is upon contestant to prove that the election results entitle him to contestee's seat.

TAKING TESTIMONY BY DEPOSITION

Sec. 7. (a) Either party may take the testimony of any person, including the opposing party, by deposition upon oral examination for the purpose of discovery or for use as evidence in the contested election case, or for both purposes. Depositions shall be taken only within the time for the taking of testimony prescribed in this section.

(b) Witnesses may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending contested election case, whether it relates to the claim or defense of the examining party or the claim or defense of the opposing party, including the existence, description, nature, custody, condition and location of any books, papers, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. After the examining party has examined the witness the opposing party may cross examine.

(c) The order in which the parties may take testimony shall be as follows:

(1) Contestant may take testimony within thirty days after service of the answer, or, if no answer is served within the time provided in section 4, within thirty days after the time for answer has expired.

(2) Contestee may take testimony within thirty days after contestant's time for taking testimony has expired.

(3) If contestee has taken any testimony or has filed testimonial affidavits or stipulations under section 8(c), contestant may take rebuttal testimony within ten days after contestee's time for taking testimony has expired.

(d) Testimony shall be taken before an officer authorized to administer

oaths by the laws of the United States or of the place where the examination is held.

(e) Attendance of witnesses may be compelled by subpena as provided in section 9.

(f) At the taking of testimony, a party may appear and act in person, or by his agent or attorney.

(g) The officer before whom testimony is to be taken shall put the witness under oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. All objections made at the time of examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, a party served with a notice of deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(h) When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and the parties. Any changes in the form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and note on the deposition the fact of the waiver or of the illness or the absence of the witness or the fact of refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress, the committee rules that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

NOTICE OF DEPOSITIONS; TESTIMONY BY AFFIDAVIT OR STIPULATION

Sec. 8. (a) A party desiring to take the deposition of any person upon oral examination shall serve written notice on the opposing party not later than two days before the date of the examination. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined. A copy of such notice, together with proof of such service thereof, shall be attached to the deposition when it is filed with the Clerk.

(b) By written stipulation of the parties, the deposition of a witness may be taken without notice. A copy of such stipulation shall be attached to the deposition when it is filed with the Clerk.

(c) By written stipulation of the parties, the testimony of any witness of either party may be filed in the form of an affidavit by such witness or the parties may agree what a particular witness would testify to if his deposition were taken. Such testimonial affidavits

or stipulations shall be filed within the time limits prescribed for the taking of testimony in section 7.

SUBPENAS; PRODUCTION OF DOCUMENTS

Sec. 9. (a) Upon application of any party, a subpena for attendance at a deposition shall be issued by:

(1) a judge or clerk of the United States district court for the district in which the place of examination is located;

(2) a judge or clerk of any court of record of the State in which the place of examination is located; or

(3) a judge or clerk of any court of record of the county in which the place of examination is located.

(b) Service of the subpena shall be made upon the witness no later than three days before the day on which his attendance is directed. A subpena may be served by any person who is not a party to the contested election case and is not less than eighteen years of age. Service of a subpena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fee for one day's attendance and the mileage allowed by section 10. Written proof of service shall be made under oath by the person making same and shall be filed with the Clerk.

(c) A witness may be required to attend an examination only in the county wherein he resides or is employed, or transacts his business in person, or is served with a subpena, or within forty miles of the place of service.

(d) Every subpena shall state the name and title of the officer issuing same and the title of the contested election case, and shall command each person to whom it is directed to attend and give testimony at a time and place and before an officer specified therein.

(e) A subpena may also command the person to whom it is directed to produce the books, papers, documents, or other tangible things designated therein, but the committee, upon motion promptly made and in any event at or before the time specified in the subpena for compliance therewith, may (1) quash or modify the subpena if it is unreasonable or oppressive, or (2) condition denial of the motion upon the advancement by the party in whose behalf the subpena is issued of the reasonable cost of producing the books, papers, documents, or tangible things. In the case of public records or documents, copies thereof, certified by the person having official custody thereof, may be produced in lieu of the originals.

OFFICER AND WITNESS FEES

Sec. 10. (a) Each judge, clerk of court, or other officer who issues any subpena or takes a deposition and each person who serves any subpena or other paper herein authorized shall be entitled to receive from the party at whose instance the service shall have been performed such fees as are allowed for similar services in the district courts of the United States.

(b) Witnesses whose depositions are taken shall be entitled to receive from the party at whose instance the witness appeared the same fees and travel allowance paid to witnesses subpenaed to appear before the House of Representatives or its committees.

PENALTY FOR FAILURE TO APPEAR, TESTIFY, OR PRODUCE DOCUMENTS

Sec. 11. Every person who, having been subpenaed as a witness under

this Act to give testimony or to produce documents, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the contested election case, shall be deemed guilty of a misdemeanor punishable by fine of not more than $1,000 nor less than $100 or imprisonment for not less than one month nor more than twelve months, or both.

CERTIFICATION AND FILING OF DEPOSITIONS

Sec. 12. (a) The officer before whom any deposition is taken shall certify thereon that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition, together with any papers produced by the witness and the notice of deposition or stipulation, if the deposition was taken without notice, in an envelope endorsed with the title of the contested election case and marked "Deposition of (here insert name of witness)" and shall within thirty days after completion of the witness' testimony, file it with the Clerk.

(b) After filing the deposition, the officer shall promptly notify the parties of its filing.

(c) Upon payment of reasonable charges therefor, not to exceed the charges allowed in the district court of the United States for the district wherein the place of examination is located, the officer shall furnish a copy of deposition to any party or the deponent.

RECORD; PRINTING AND FILING OF BRIEFS AND APPENDIXES

Sec. 13. (a) Contested election cases shall be heard by the committee on the papers, depositions, and exhibits filed with the Clerk. Such papers, depositions, and exhibits shall constitute the record of the case.

(b) Contestant shall print as an appendix to his brief those portions of the record which he desires the committee to consider in order to decide the case and such other portions of the record as may be prescribed by the rules of the committee.

(c) Contestee shall print as an appendix to his brief those portions of the record not printed by contestant which contestee desires the committee to consider in order to decide the case.

(d) Within forty-five days after the time for both parties to take testimony has expired, contestant shall serve on contestee his printed brief of the facts and authorities relied on to establish his case together with his appendix.

(e) Within thirty days of service of contestant's brief and appendix, contestee shall serve on contestant his printed brief of the facts and authorities relied on to establish his case together with his appendix.

(f) Within ten days after service of contestee's brief and appendix, contestant may serve on contestee a printed reply brief.

(g) The form and length of the briefs, the form of the appendixes, and the number of copies to be served and filed shall be in accordance with such rules as the committee may prescribe.

FILINGS OF PLEADINGS, MOTIONS, DEPOSITIONS, APPENDIXES, BRIEFS, AND OTHER PAPERS

Sec. 14. (a) Filings of pleadings, motions, depositions, appendixes, briefs, and other papers shall be accomplished by:

(1) delivering a copy thereof to the Clerk of the House of Representatives at his office in Washington, District of Columbia, or to a member of his staff at such office; or

(2) mailing a copy thereof, by registered or certified mail, addressed to the Clerk at the House of Representatives, Washington, District of Columbia: *Provided*, That if such copy is not actually received, another copy shall be filed within a reasonable time; and

(3) delivering or mailing, simultaneously with the delivery or mailing of a copy thereof under paragraphs (1) and (2) of this subsection, such additional copies as the committee may by rule prescribe.

(b) All papers filed with the Clerk pursuant to this Act shall be promptly transmitted by him to the committee.

TIME; COMPUTATION AND ENLARGEMENT

Sec. 15. (a) In computing any period of time prescribed or allowed by this Act or by the rules or any order of the committee, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. For the purposes of this Act, "legal holiday" shall mean New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States.

(b) Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of a pleading, motion, notice, brief, or other paper upon him, which is served upon him by mail, three days shall be added to the prescribed period.

(c) When by this Act or by the rules or any order of the committee an act is required or allowed to be done at or within a specified time, the committee, for good cause shown, may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect, but it shall not extend the time for serving and filing the notice of contest under section 3.

DEATH OF CONTESTANT

Sec. 16. In the event of the death of the contestant, the contested election case shall abate.

ALLOWANCE OF PARTY'S EXPENSES

Sec. 17. The committee may allow any party reimbursement from the contingent fund of the House of Representatives of his reasonable expenses of the contested election case, including reasonable attorneys fees, upon the verified application of such party accompanied by a complete and detailed

account of his expenses and supporting vouchers and receipts.

REPEALS

Sec. 18. The following provisions of law are repealed:

(a) Sections 105 through 129 of the Revised Statutes of the United States (2 U.S.C. 201–225).

(b) The second paragraph under the center heading "House of Representatives" in the first section of the Act of March 3, 1879 (2 U.S.C. 226).

(c) Section 2 of the Act entitled "An Act further supplemental to the various Acts prescribing the mode of obtaining evidence in cases of contested elections", approved March 2, 1875 (2 U.S.C. 203).

EFFECTIVE DATE

Sec. 19. The provisions of, and the repeals made by, this Act shall apply with respect to any general or special election for Representative in, or Resident Commissioner to, the Congress of the United States occurring after the date of enactment of this Act.

Approved December 5, 1969.

Prior to the Federal Contested Election Act, election contests were governed by the provisions of the now repealed Contested Elections Act, 2 USC §§ 201–226. This statute itself was derived in part from an earlier statute dating from the acts of Feb. 19, 1851, with sundry subsequent amendments.

Except for the contested election of Tunno v Veysey (§ 64.1, infra), all the election contest cases in this chapter were decided under the prior statute. For this reason, citations are given to the prior statute, and comparable provisions in the present statute are generally cited in footnotes.

Congress, in judging election disputes involving its Members, will look first to the applicable federal law, if any, and then to the applicable state law.

In the Kemp, Sanders investigation (§ 47.14, infra), Congress looked to the state law regulating the time for the holding of elections to fill vacancies, there being no federal law on the subject.

## *Application of State Law*

### § 2.1 At the state level, an election contest may be initiated pursuant to a state law making it mandatory for the secretary of state or other state official to conduct a recount at the request of either candidate.

In the 1938 New Hampshire election contest of Roy v Jenks (§ 49.1, infra), the original official returns from the Nov. 3, 1936, election gave Arthur B. Jenks a plurality of 550 votes over Alphonse Roy. Mr. Roy then applied to the New Hampshire Secretary of State for a recount, pursuant to

state law making it mandatory for that official to conduct a recount upon request of either candidate. Ultimately the House voted to seat Mr. Roy.

## § 3. State or Local Election Boards

Article I, section 4, clause 1 of the United States Constitution provides that the State legislatures shall prescribe the time, place and manner of holding congressional elections, but authorizes the Congress at any time to make or alter such regulations (except as to the location for electing Senators). Although Congress has provided the time for the election of Representatives (see 2 USC § 7), most of the procedures for holding elections to the House—including the printing, casting, and counting of ballots—have been left to the state and local election boards and commissions to prescribe. (See Ch. 8, supra, for a complete discussion of election procedures.) Ordinarily, the House will refuse to intervene to overturn voting procedures adopted by the local authorities.[6] And it has been held that the House has no authority to order them to conduct a recount.[7]

### *Lack of Authority Over State or Local Election Boards*

**§ 3.1 The House has no authority to order a state or local board of elections to conduct a recount.**

In Sullivan v Miller (§ 52.5, infra), a 1943 Missouri contest, the parties filed a joint application proposing that the House order the Missouri Board of Election Commissioners to conduct a recount. It was concluded that although the House itself, through an elections committee, could undertake a recount, there was no precedent wherein the House had ordered a state or local board of election commissioners to take a recount.

### *Intervention in State or Local Elections*

**§ 3.2 The House will refuse to intervene in an election contest at the state or local level, even at the request of both parties.**

In Sullivan v Miller (§ 52.5, infra), a 1943 Missouri contest, the parties had filed a joint application proposing that the House order the Missouri Board of Election Commissioners to conduct a recount. This application alleged that a prior recount by the state in a local election for Recorder in-

6. § 3.2, infra.
7. § 3.1, infra.

dicated a miscount of over 1,000 votes. The report of the Committee on Elections determined that the contest had not been formally brought before the House, and that the House should not intervene in a local contest merely to gather evidence for the parties.

## B. JURISDICTION AND POWERS

### § 4. The House

The House acquires jurisdiction of an election contest upon the filing of a notice of contest.[8] Normally the papers relating to an election contest are transmitted by the Clerk to the Committee on House Administration, pursuant to 2 USC § 393(b), without a formal referral or other action by the House. However, the House may initiate an election investigation if a Member-elect's right to take the oath is challenged by another Member, by referring the question to the committee. The House may also summarily dismiss a contest by the adoption of a resolution providing therefor.[9] In some cases, the House has even advised a contestant that it will not consider any future petitions or matters relating to the case.[10]

One way that the House exercises its control over election contests is by refusing to administer the oath to a party in an election contest until the contest is resolved.[11]

#### *Notice of Contest as Basis of Jurisdiction*

**§ 4.1 Jurisdiction of a contested election is acquired by the House upon the filing of a notice of contest as required by the contested elections law with the Clerk of the House. Jurisdiction cannot be conferred on the House, or on a committee thereof, by any joint agreement of the parties.**

In the 1943 Missouri contested election case of Sullivan v Miller (§ 52.5, infra), the parties filed a joint application proposing that the House order the Missouri Board of Election Commissioners to conduct a recount. The Clerk's letter to the Speaker advised that the parties had submitted a joint letter and drafts of resolutions or-

8. § 4.1, infra.
9. §§ 4.4, 4.5, infra.
10. § 51.1, infra.
11. § 4.3, infra.

dering the recount and extending time for taking testimony, together with depositions in support thereof. After further investigation, the election committee recommended in its report that the House should not intervene in the contest "that has been initiated but not brought officially to the House . . . ." During brief debate in the House, a Member stated that the effect of the committee's unanimous report would be to establish that jurisdiction could not be "conferred on the House or any of its committees by any joint agreement of parties to an alleged election contest unofficially or otherwise submitted."

### *Power Over Administration of Oath to Candidate in Election Contest*

**§ 4.2 The House, by resolution, may authorize the Speaker to administer the oath of office to a Member-elect whose election is in dispute, even though he does not possess a certificate of election.**

In the 1933 Maine election contest of Brewster v Utterback (§ 47.2, infra), a Member objected to the oath being administered to Member-elect Utterback, who then stood aside while other Members-elect and Delegates-elect were sworn. The House then adopted a resolution authorizing the Speaker to administer the oath to Mr. Utterback even though the latter did not possess a certificate of election from his state.

**§ 4.3 Where two persons claim the same seat in the House from the same congressional district, the House may refuse to permit either candidate to take the oath of office pending a determination of their rights by the House.**

In the Kemp, Sanders investigation (§ 47.14, infra), arising from a special election held in Louisiana to fill the vacancy created by the death of Bolivar E. Kemp, the widow of Mr. Kemp claimed to be elected to the seat on the basis of an election held on Dec. 5, 1933, and the contestant claimed the seat on the basis of an election held on Dec. 27, 1933. Confronted with allegations that the Governor had personally selected the candidates and given unreasonable notice of the time, place, and manner of the election, the House declined to seat either party on the convening of the second session of the 73d Congress on Jan. 3, 1934. Ultimately, the House resolved, after investigation, that neither party had been validly elected and directed the Speaker to commu-

nicate the fact of the vacancy to the Governor of Louisiana.

### *Power of Summary Dismissal of Election Contest*

**§ 4.4 The House may dismiss an election contest, on the ground that contestant is incompetent to initiate the proceeding, by adoption of a resolution.**

In the 1941 Ohio election contest of Miller v Kirwan (§ 51.1, infra), the Majority Leader called up as privileged a resolution dismissing an election contest, which resolution the House adopted without debate and by voice vote. The resolution stated that the contestant who had been a candidate in the party primary, but not in the general election, was not a person competent to bring a contest for the seat.

**§ 4.5 Election contests are ordinarily referred to a committee for investigation and study; however, there have been instances in which the House, acting without committee action and consideration, has dismissed a contest.**

In Miller v Kirwan (§ 51.1, infra), a 1941 Ohio contest, the House dismissed an election contest which had not been referred to the Committee on House Administration; it appeared that contestant had not been a candidate in the general election he disputed, and was therefore incompetent to initiate the proceeding.

### *Notification to Governor of Vacancy*

**§ 4.6 The House authorized the Speaker to notify a Governor of the existence of a vacancy, where neither party to a contest was found to be validly elected.**

In the Kemp and Sanders investigation (§ 47.14), a committee on elections concluded that neither of two elections held to fill a vacancy in a Louisiana seat in the 73d Congress was vaIid. Subsequently, House Reso]ution 231 was called up as privileged and adopted by voice vote. The resolution set forth the conclusion of the committee and authorized the Speaker to notify the Governor of the existing vacancy.

## § 5. Election Committees

Jurisdiction over contested elections is given to the Committee on House Administration by the House rules;[12] and the responsi-

12. Rule XI clause 9(k), *House Rules and Manual* § 693 (1973).

bility for hearing contested election cases falls on the Committee on House Administration.[13]

Under the Federal Contested Elections Act, the term "committee" means the Committee on House Administration of the House of Representatives.[14]

In this chapter, the term "committee," or "election committee," refers generally to the Subcommittee on Elections of the Committee on House Administration in the case of contests after 1946, or the particular election committee investigating a contest (such as Elections Committee No. 3) in the case of contests prior to the 1946 congressional reorganization.

Prior to the 1946 reorganization of House committees, election contests were brought before an "elections" committee. Such a committee had been created in 1794 and divided into three committees in 1895, each consisting of nine members.[15] In 1946, these committees were merged in the Committee on House Administration, as was the Committee on the Election of the President, Vice President, and Representatives in Congress, which had been in existence since 1893. Generally, the latter committee was responsible for regulating the time and manner of elections, and campaign expenditures and practices.[16]

### *Jurisdiction Over Contests Initiated Under the Contested Elections Statutes*

**§ 5.1 Among the election disputes that were referred to a committee on elections for disposition was a contest initiated under the contested election statute by an individual who, though not a candidate, was protesting the elections of Members from states having poll taxes.**

See In re Plunkett (§ 53.2, infra), a 1945 dispute, wherein a letter of explanation from the Clerk was referred to the elections committee; the committee took no action in the matter, it appearing that the contestant, not being a candidate in the disputed election, was not qualified to initiate the proceedings.

**13.** 2 USC § 392(a).

**14.** 2 USC § 381(g).

**15.** 4 Hinds' Precedents § 4019.

**16.** For information regarding the creation and history of the Committee on the Election of the President, Vice President, and Representatives in Congress, see 4 Hinds' Precedents § 4299; and 7 Cannon's Precedents § 2023.

### *Overlapping Jurisdiction; Committee to Investigate Campaign Expenditures*

**§ 5.2 Parliamentarian's Note: Prior to the 93d Congress, a Special Committee to Investigate Campaign Expenditures was often created with subpena authority to expedite the investigation of certain elections.**[17]

In the 1963 Minnesota election contest of Odegard v Olson (§ 60.1, infra), several minority members of the election committee pointed to the "confusion which may be created during the period surrounding a general election by the existence of two separate committees of the House having parallel and overlapping jurisdiction." The contestee had complained about allegedly improper evidence submitted by the contestant to the Special Committee to Investigate Campaign Expenditures of the 87th Congress, which evidence had been referred to the Committee on House Administration.

**§ 5.3 A "Special Committee to Investigate Campaign Expenditures of the House of Representatives" of the preceding Congress recommended that the Committee on House Administration investigate certain disputed returns and report to the House by a certain date.**

In the 1958 Maine contested election of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, representatives from a special House committee established by the 84th Congress were present at a recount conducted under a Maine state law; the committee later issued a report recommending that the Committee on House Administration immediately investigate the approximately 4,000 ballots in dispute and report to the House by Mar. 15, 1957. The committee minority contended unsuccessfully that a committee of the 84th Congress should not "purport to dictate to the Committee on House Administration of the 85th Congress how it shall conduct its operations or when it shall file its report."

### *Qualifications of Members on Subcommittee on Elections*

**§ 5.4 The members of the Subcommittee on Elections of the Committee on House Administration are chosen on the basis of their seniority and legal experience.**

In the 1965 Iowa election contest of Peterson v Gross (§ 61.3,

17. For a more complete discussion of this subject. see Ch. 8 § 14, supra.

infra), during debate on a resolution dismissing the contest, a Member criticized the composition of the subcommittee on elections because, as he stated, no Member on the majority side was "from north of Virginia or west of the Mississippi River." In response, House Administration Committee Chairman Omar T. Burleson, of Texas, stated that subcommittee members were chosen because they were lawyers and on the basis of seniority.[18]

### *Power to Dismiss Contests*

**§ 5.5 The power to dismiss a contest, on proper grounds, is one normally exercised by the House itself; however, there have been instances in which the power to recommend dismissal has been exercised by the committee to which the contest had been referred.**

In the 1940 Tennessee election contest of Neal v Kefauver (§ 50.1, infra), the election committee submitted a report stating that it had dismissed the contest for failure of the contestant to take evidence and because there was no evidence before the committee of the matters charged in his notice of contest, and no briefs filed. The contestant had not appeared in person as requested by the committee. The House adopted a resolution from the committee that the contestee was entitled to the seat.

**§ 5.6 A motion to dismiss a contest for failure of contestant to take testimony within the time prescribed by law will be referred to the committee with jurisdiction over election disputes.**

In the 1947 Illinois contested election case of Woodward v O'Brien (§ 54.6, infra), the Clerk transmitted the contestee's motion to dismiss for failure of the contestant to take testimony within the time prescribed by law to the Speaker for reference to the Committee on House Administration, which subsequently issued a report recommending dismissal of the contest.

### *Actions to Preserve Evidence in Election Contests*

**§ 5.7 An elections committee may request county auditors to retain and preserve the ballots and other papers for use in an election contest, although declining to assume custody of the ballots.**

18. 111 CONG. REC. 26503, 89th Cong. 1st Sess., Oct. 11, 1965, during debate on H. Res. 602.

In the 1957 Iowa contested election of Carter v LeCompte (§ 57.1, infra), the Committee on House Administration denied a motion by the contestant that the committee assume custody of the ballots. However, the committee did, by telegram, request county auditors to preserve all ballots and other papers for possible use by the committee. The request was honored in each county. The committee noted that the laws of Iowa afforded no mode of preserving the ballots cast, and in fact directed the auditors to destroy the ballots in congressional elections after six months.

**§ 5.8 Where state law mandated destruction of the ballots after an election, an elections committee notified state officials to preserve the ballots notwithstanding the state law.**

In the 1959 Kansas election contest of Mahoney v Smith (§ 58.2, infra), an elections committee acted upon the contestant's motion for preservation of the ballots by notifying state officials to preserve ballots despite state law which required their destruction six months after the election. Certain county clerks, however, had not been officially notified of the pending contest and had destroyed ballots prior to the filing of the contestant's motion.

**§ 5.9 An elections committee may go to the site of an election and take physical custody of the ballots and other materials to facilitate the investigation of the right of a Member-elect to a seat in the House.**

Following the 1958 Arkansas election of write-in candidate Dale Alford to a seat in the House (§ 58.1, infra), the House authorized the Committee on House Administration to send for persons and papers and to examine witnesses under oath. The Committee on House Administration in turn requested the federal authorities in possession of the ballots and other documents to release them to the committee. To facilitate the investigation, the Subcommittee on Elections traveled to Little Rock, Arkansas, to take physical custody of the ballots and other materials.

### *Power to Examine and Recount Disputed Ballots*

**§ 5.10 The Committee on House Administration has adopted motions to conduct an examination and recount of disputed ballots and to request counsel for both par-**

**ties to reduce the number of ballots in dispute.**

In the 1958 Maine contested election of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, the Committee on House Administration on Apr. 30, 1958, adopted motions to conduct an examination and recount of the disputed ballots, and to request counsel for both parties to reduce further, if possible, the number of ballots in dispute. Accordingly, counsel reduced the number to 142 regular ballots and 3,626 absentee ballots in dispute, thus giving contestee a stipulated plurality of 174 votes.

**§ 5.11 An elections committee has the power to declare invalid an entire group of ballots, but it will exercise such power only where it cannot distinguish the valid ballots from the invalid ballots.**

In Chandler v Burnham, a 1934 California contest (§ 47.4, infra), the contestant alleged numerous irregularities concerning the method of counting ballots, the composition of election boards, the preparation of tally sheets, and the like. The contestant sought to have the returns rejected in total. The elections committee, however, while recognizing its power to reject an entire group of ballots, declared that such power would be exercised only "where it is impossible to ascertain with reasonable certainty the true vote."

### *Continuing Investigations*

**§ 5.12 Upon adoption by the House of a resolution sanctioning it, the Committee on House Administration may continue its investigation into a contested election case notwithstanding any adjournment or recess of a session of Congress.**

In Wilson v Granger (§ 54.5, infra), a 1948 Utah contest, the House agreed by voice vote and without debate to a resolution (H. Res. 338) authorizing the Committee on House Administration to continue an investigation that had been delayed over a year by numerous extensions granted to the parties in a contested election case. The expenses of the investigation were authorized to be paid out of the contingent fund of the House and any testimony and papers referred by the Speaker to the committee were to be printed as House documents of the next succeeding session of the Congress.[19]

**19.** See also Lowe v Davis, § 54.1, infra; and Mankin v Davis, § 54.2, infra.

### *Advisory Opinions on State Law*

**§ 5.13 An elections committee may accept the opinion of a state attorney general as to the effect of state laws for disputing an election.**

In the 1957 Iowa contested election of Carter v LeCompte (§ 57.1, infra), the election committee expressly rejected the ruling in Swanson v Harrington (§ 50.4, infra), a 1940 Iowa election contest in which the contestant had been required to show, by seeking recourse to the highest state court, that the Iowa election laws did not permit him a recount. This time, however, the committee adopted the view of the Iowa attorney general, as expressed in a letter to the Governor and secretary of state, that the laws of Iowa contained no provision for contesting a House seat.

**§ 5.14 An advisory opinion by a state supreme court that ballots from certain precincts should be discounted for failure of election officials to perform duties made mandatory by state law may be accepted as binding by an elections committee of the House.**

In Brewster v Utterback (§ 47.2, infra), a 1933 Maine contest, contestant alleged the fraudulent or negligent failure. of election officials to perform their duties as required by state law. He claimed that election officials had neglected to provide voting booths in certain precincts, that in another precinct more ballots had been cast than there were voters, and that in yet another precinct officials had illegally permitted and assisted unqualified voters to cast ballots.

The Committee on Elections assumed the validity of the state supreme court opinion to the effect that certain ballots should be discounted for failure of election officials to perform duties required by state law.

## § 6. The Clerk; Transmittal of Papers

Under the modern practice, all papers filed with the Clerk pursuant to the Federal Contested Elections Act are to be promptly transmitted by him to the Committee on House Administration.[20] By long-standing practice, testimony taken by deposition in an election contest is transmitted to the Clerk.[21]

Under the prior contested elections statute, the Clerk trans-

**20.** 2 USC § 393(b).

**21.** 1 Hinds' Precedents §§ 703, 705.

mitted the original notice of contest, answer, and testimony directly to the committee (pursuant to 2 USC § 223), but other special motions and papers filed with the Clerk by either party were forwarded to the Speaker for reference by him to the committee, as reflected in the precedents which follow.

### *Items Transmitted by Clerk to Speaker*

**§ 6.1 Prior to 1969, among the documents that were communicated to the Speaker for reference to an elections committee was a communication to the Clerk from a contestee raising the question as to whether contestant was barred from proceeding further because of a failure to comply with some provision of the Federal Contested Elections Act.**

In Clark v Nichols (§ 52.1, infra), a 1943 Oklahoma contest, the contestee sought to bar contestant from further proceeding under the statute because of a failure to forward certain testimony to the Clerk within the time required by law. The contestee's letter to this effect was transmitted to the Speaker for referral.

**§ 6.2 In the event that certificates of election are submitted by both parties to a contest, they are included with the communication from the Clerk to the Speaker.**

In the 1934 Kemp, Sanders investigation (§ 47.14, infra), the Clerk transmitted a certificate of election of Mrs. Bolivar E. Kemp, Sr., signed by the Governor of Louisiana and attested by the secretary of the State of Louisiana, along with a certificate of election of J. Y. Sanders, which certificate was prepared by the "Citizens' Election Committee of the Sixth Congressional District." Ultimately, the House determined that neither party had been validly elected.

**§ 6.3 Among the papers which prior to 1969 the Clerk transmitted to the Speaker for reference to an elections committee was a contestant's application for extension of time for taking testimony.**

In the 1943 Illinois election contest of Moreland v Schuetz (§ 52.3, infra), the Speaker laid before the House a letter from the Clerk conveying a request by the contestant for an extension of time because the time and facilities of the responsible election officials were

then being totally consumed in preparation for local elections. By resolution, the House extended the time for taking testimony by 65 days.

**§ 6.4 The Clerk's letter transmitting a contest has been ordered printed by the Speaker to include copies of the contestant's notice of the contest, contestee's answer thereto, contestee's two motions to dismiss the contest, and contestant's memorandum in explanation of his failure to take testimony within the time prescribed by law and of his discontinuance of further action in the matter.**

In the 1951 Missouri contested election case of Karst v Curtis (§ 56.2, infra), the contestant brought the contest on the advice of his county party committee, based on allegations of improper tallying of ballots in a local election held simultaneously with his own. When the recount failed to disclose the discrepancies, the contestant notified the House of his decision to discontinue action, which the Speaker ordered printed as a House document and referred to the Committee on House Administration along with the other documents received by the Clerk. The other documents included: (1) contestant's notice of contest; (2) contestee's answer; (3) contestee's motion to dismiss for failure of contestant to take testimony within 40 days after service of answer; (4) a memorandum from contestant explaining his failure to take testimony during the 40 days; and (5) contestee's renewed motion to dismiss for failure of contestant to take testimony during the 90-day statutory period.

**§ 6.5 A communication from the Clerk transmitting a memorial challenging the right of a Member-elect to a seat was referred to a committee on elections but not printed as a House document**

In the 1933 investigation of the citizenship qualifications of a Member-elect from Pennsylvania, In re Ellenbogen (§ 47.5, infra), the Clerk transmitted to the Speaker a letter containing a memorial and accompanying papers filed by Harry A. Estep, a former Member, challenging the citizenship qualifications of the Member-elect. The communication and accompanying papers were referred to the Committee on Elections, but not ordered printed.

**§ 6.6 In his letter of transmittal to the Speaker rel-**

**ative to an election contest, the Clerk may point out that he does not regard the contestant as competent to bring the contest under the statutes governing such proceedings.**

See In re Plunkett (§ 53.2, infra), a 1945 dispute, in which the Clerk expressed his belief that an individual who was attempting to contest the election of 79 Members from various states had not been a party to any of the elections and was therefore incompetent to initiate such a contest.

**§ 6.7 In his letter of transmittal to the Speaker, the Clerk may point out that neither party had taken testimony during the time prescribed by law and that the contest appears to have abated.**

In Roberts v Douglas (§ 54.4, infra), a 1947 California contest, the Clerk's letter, together with copies of the contestant's notice of contest and contestee's motion to dismiss and a letter from her attorney in support thereof, were referred by the Speaker to the Committee on House Administration. The Clerk's letter noted that testimony had not been timely taken and that the contest appeared to have abated. The House subsequently agreed to dismiss the contest on a voice vote and without debate.

**§ 6.8 The Clerk may include the contestee's answer, though filed for information only, in a letter transmitted to the Speaker stating the Clerk's opinion that the contest has abated.**

In Browner v Cunningham, a 1949 Iowa contested election case (§ 55.1, infra), the contestee's answer was transmitted by the Clerk to the Speaker along with the Clerk's letter relating that no testimony had been received and the opinion of the Clerk that the contest had abated.

**§ 6.9 Where the Clerk receives an application for an extension of time for taking testimony, he communicates that fact to the Speaker together with accompanying papers, which the Speaker then refers to an appropriate committee.**

In Sullivan v Miller (§ 52.5, infra), a 1943 Missouri contest, an application for an extension of time for taking testimony, although filed before the contest had been formally presented to the House, was communicated by the Clerk to the Speaker together

with accompanying papers, which the Speaker referred to a committee and ordered printed.

**§ 6.10 In communicating with the Speaker relative to an apparent election contest and papers pertaining thereto, the Clerk may rely on "unofficial knowledge." And the Speaker may refer such communication and accompanying papers to a committee on elections.**

In Reese v Ellzey (§ 47.13, infra), a 1934 Mississippi contest, the Speaker laid before the House a letter from the Clerk transmitting his "unofficial knowledge" of the contest, together with contestant's letter of withdrawal therefrom. The Clerk's letter and accompanying papers were referred to a committee on elections and ordered printed.

**§ 6.11 The Clerk's letter transmitting a notice of contest to the Speaker may disclose that the contestee has not filed a brief in support of his position within the time prescribed by law.**

In the 1947 Georgia election contest of Mankin v Davis (§ 54.2, infra), the Clerk's letter, which the Speaker ordered printed as a House document, stated that the contestant had complied with the requirements to forward his brief to the contestee and file notice within 30 days, but that the contestee had not submitted his brief in answer within the requisite time.

**§ 6.12 In the Clerk's letter of transmittal, he may include the information that contestant has not forwarded testimony to his office in the manner prescribed by law.**

In Hicks v Dondero (§ 53.1, infra), a 1945 Michigan contest, the Clerk's letter of transmittal to the House related that he had received packets of material which had not been addressed to the Clerk, or prepared in the manner required by law. The Clerk's letter further stated that since the proper statutory procedure had not been followed, he was transmitting all of the material received to the House for its disposition.

***Production of Documents Under Subpena***

**§ 6.13 The Clerk has refused to comply with a subpena duces tecum served upon him by a contestant's notary public requesting production of documents filed by the contestee.**

In the 1934 Illinois contested election case of Weber v Simpson

(§ 47.16, infra), the contestant's notary public served a subpena duces tecum upon the Clerk, who refused to comply with it without permission of the House. The subpena requested production of documents filed by the contestee in the dispute. The subpena and accompanying papers were referred to the Committee on the Judiciary and ordered printed. The 73d Congress did not authorize the Clerk to respond to the subpena.

## § 7. The Courts

Although the House is the final judge of the elections of its Members, candidates are frequently subjected to actions in state and federal courts for violations of laws regulating campaign practices, an area which Congress has largely left to the states. Beyond the scope of this chapter are injunctions against the issuance of election certificates[22] and suits by individuals such as those arising from violations of the 1965 Voting Rights Act, 42 USC §§ 1971 et seq., and court-ordered congressional redistricting.[1]

This section takes up precedents involving (1) the necessity to appeal to state courts before the election to cure pre-election irregularities;[2] (2) the acceptance of advisory opinions from state courts on the laws of that state;[3] and (3) the binding effect of local court determinations.[4]

The House has stated that local magistrates lack authority to break open ballot boxes.[5]

### *Appeal to State Court Regarding Pre-election Irregularities*

**§ 7.1 A contestant must exhaust state law remedies by protesting pre-election irregularities to the state board of election, with appeal to the state courts, prior to the election, in order to overturn the results of that election on the basis of the pre-election irregularity.**

**22.** See Ch. 8 § 16.4, supra, for discussion of an instance wherein a state court had issued a preliminary injunction against the issuance of a certificate to a Member-elect, and the House referred the question of his right to be seated to a committee.

**1.** See *Wesberry* v *Sanders,* 376 U.S. 1 (1963) and kindred cases such as *Gray* v *Sanders,* 372 U.S. 368 (1963) which invalidated the use of the "county unit" system of selecting party candidates. Generally, see Ch. 8, supra.

**2.** § 7.1, infra.

**3.** § 7.3, infra.

**4.** § 7.4, infra.

**5.** § 7.7, infra. The jurisdiction of the courts over the election of Members is more fully discussed in Ch. 8, supra.

In the 1951 Ohio contested election case of Huber v Ayres (§ 56.1, infra), the majority of the committee recommended dismissal of a contest on the basis that the contestant had failed to exhaust his state remedies first. The majority also suggested that discrimination against the contestant may have been due to the failure of the Ohio legislature to implement a constitutional provision calling for an equal rotation of the candidates' names in the different positions on the ballots. Although the minority disagreed with the majority conclusion, and further argued that the contestant had not been afforded a fair chance to discover the error before the election in order to take appropriate action, the House nevertheless approved a resolution dismissing the contest and seating the contestee.

**§ 7.2 Contestant did not have to seek recourse to the highest state court to show that the Iowa election laws did not permit him a recount under state law.**

In the 1957 Iowa contested election case of Carter v LeCompte (§ 57.1, infra), the elections committee expressly overruled the view of the committee in the 1940 election contest of Swanson v Harrington (§ 50.4, infra), in which the contestant had been required to seek recourse to the highest state court in order to show that the Iowa election laws did not permit him to seek a recount. The committee adopted the opinion of the state attorney general as expressed in a letter to the Governor and secretary of state.

### *Advisory Opinions by State Courts*

**§ 7.3 A state supreme court, empowered to issue advisory opinions, advised a state Governor to issue a certificate of election to a contestee, based on the official canvass of votes, and that he had no authority to determine the validity of disputed ballots counted in that canvass.**

In the 1958 Maine contested election case of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, a recount was conducted as permitted by state law with representatives present from the "Special Committee to Investigate Campaign Expenditures of the House of Representatives." The contestee requested that a certificate of election be issued to him, to which request the contestant objected. The Governor declined to issue such certificate pending receipt of an

advisory opinion from the Supreme Court of Maine. The supreme court advised that the Governor had no authority to determine the validity of disputed ballots, and that he should issue a certificate based on the official canvass of votes. Accordingly, the Governor and council issued the certificate of election to the contestee on Dec. 5, 1956.

### *Local Court Determinations as Controlling*

**§ 7.4 Where state law required county residence for a certain length of time as a qualification for registration, and no challenge of voters was made at the time of such registration or at the time of voting, a local court interpretation as to when residency commenced to run was regarded by the House elections committee as controlling.**

In the 1951 New York contested election case of Macy v Greenwood (§ 56.4, infra), the contestee had received a plurality of only 135 votes over the contestant, who argued that 932 voters were not qualified as to residence for the reason that they had not satisfied the four-month county residency requirement under state law. According to the contestant, such period should have begun when a voter actually moved into the district rather than on the date of signing a contract to purchase a house therein. The House committee, however, found that the local board of elections had relied, in their interpretation of the requirement, on a county court decision to the effect that the date of signing any such contract was determinative.

In expressing the view that the votes had been fairly tabulated, the committee found that no challenges were made under provisions of New York law which permitted challenging of voters at the time of registration and voting. Furthermore, the committee report stated that no instance could be found in which the House had rejected votes as illegal for the reason that the voter had not resided in the county for the statutory period of time. In recommending adoption of a resolution seating the contestee, the committee also noted that, "Had it found the votes illegally cast, the votes presumably would be deducted proportionally from both candidates, according to the entire vote returned for each."

The contest was subsequently dismissed by the House.

**§ 7.5 A committee on elections stated that it was not bound**

**by the actions of a state court in supervising a recount; but the committee denied contestant's motion to suppress testimony obtained at a state inquiry, where the contestant had initiated the state recount procedure and would be estopped from offering rebuttal testimony as to the result of the recount.**

In Kent v Coyle (§ 46.1, infra), a partial recount was conducted by a state court pursuant to state law; but a committee on elections held that contestant had failed to sustain the burden of proof of fraud where a discrepancy between the official returns and the partial recount was inconclusive.

### *Interpretation of Law Governing Nominations*

**§ 7.6 A committee on elections adopted a state court decision on the legality of the nomination of a party candidate, where petitioner, who had unsuccessfully sought such nomination for himself, filed a petition in the House against the candidate who had subsequently defeated the nominee in the general election.**

In Lowe v Thompson (§ 62.1, infra), a contest was dismissed and a petition denied where a state court suit challenging the alleged irregular nomination of the candidate opposing contestee had been dismissed.

### *Magistrates Lack Authority To Open Ballot Boxes*

**§ 7.7 A magistrate taking testimony in an election contest is not a person or tribunal authorized to try the merits of the contest and has no authority to order ballot boxes to be broken open.**

In the 1949 Michigan contested election case of Stevens v Blackney (§ 55.3, infra), the committee majority cited early cases in the report quoting the "accepted uniform rule" that a magistrate taking testimony "was not a person or a tribunal authorized to try the merits of the election [contest] and had no authority under the law of Pennsylvania or of Congress to order those boxes to be broken open."

## C. GROUNDS OF CONTEST

### § 8. Generally

While the new Federal Contested Elections Act (2 USC §§ 381–396) does not attempt to describe or specify the grounds upon which a contestant may bring an election contest, it is significant that 2 USC § 383(b)(3) provides that the contestee may assert as a defense "failure of notice of contest to state *grounds sufficient to change result of election*" (emphasis supplied). Hence, the grounds asserted by the contestant in bringing an election contest should be sufficient to change the result of the election, under the new statute.

The House generally will not unseat a Member for alleged campaign irregularities if he possesses a proper certificate of election and where the violations of the applicable statutes were unintentional and not fraudulent.[6]

Failure to file timely and accurate expenditure reports with the Clerk of the House does not necessarily deprive a contestee of his seat, and the Committee on House Administration will consider evidence of mitigating circumstances and negligence, as opposed to fraud.[7]

**6.** See Ch. 8, supra.

**7.** *Id.*

### § 9. Faulty Credentials; Citizenship

After presentation of a certificate of election to the Clerk, the Member-elect is usually administered the oath along with the other Members-elect, unless he is asked to step aside. Once sworn and seated, the contestee may benefit from a number of presumptions which must be refuted by the contestant (see §§ 35, 36, infra). Hence, the possession of a certificate of election, issued by state authorities, declaring a candidate to be the winner of the election, is of great importance.

A challenge to seating a Member-elect may also be based on his failure to meet the constitutional requirements as to citizenship, residence, or age for the office, and in that context is treated as a matter of "exclusion" and not as an election contest. (See Ch. 8, supra.)

#### *Certificates of Election*

**§ 9.1 Where two persons claim a seat in the House from the same congressional district, one having a certificate of election signed by the Governor of the state, and the**

**other having a certificate of election from a citizens' elections committee, the House may refuse to permit either to take the oath of office and refer the dispute to a House committee on elections.**

In the 1934 Kemp, Sanders investigation (§ 47.14, infra), both parties claimed credentials to the seat from the Sixth Congressional District of Louisiana. The Clerk transmitted a certificate of election of Mrs. Bolivar E. Kemp, signed by the Governor of Louisiana and attested by the secretary of the State of Louisiana, to fill a vacancy created by the death of her husband. The Clerk's letter also transmitted a certificate of election of J. Y. Sanders, prepared by the "Citizens' Election Committee of the Sixth Congressional District," to fill the vacancy. The House refused to permit either party to take the oath of office and referred the question of their prima facie credentials to the Committee on Elections.[8]

**§ 9.2 There have been instances in which the House has permitted a contestee to be seated pending the outcome of a contest brought against him, notwithstanding the fact that he does not hold a certificate of election signed by the Governor of his state.**

In Brewster v Utterback (§ 47.2, infra), a 1933 Maine contest, it was contended that the House should not recognize the prima facie right of a contestee to a seat by permitting him to take the oath absent a certificate of election. It was ruled, following earlier precedents, that the House may permit a Member-elect to take the oath of office after being "satisfied [from the evidence] that the man was elected," though it appears that his election might still be in dispute.

**§ 9.3 A certificate of election from a state Governor is only prima facie evidence of election and may be rendered ineffective by adoption of a House resolution referring the election contest to the Committee on House Administration without seating either candidate.**

In the 1961 Indiana investigation of the right of Roush or Chambers to a seat in the House (§ 59.1, infra), the House agreed, by a division of 205 yeas to 95 nays, to a resolution on the day of organization that referred the case to the Committee on House

8. Certificates of election are also discussed in Ch. 8, supra.

Administration, and seating neither party to the dispute, although the Governor of Indiana had already certified Chambers as the winner with a 12-vote majority of the 214,615 votes cast.

### *Citizenship*

**§ 9.4 A Member-elect who has not been a citizen for seven years when elected or upon the convening of Congress may be challenged as unqualified under the Constitution.**

In the 1933 investigation of the citizenship qualifications of a Member-elect from Pennsylvania, In re Ellenbogen (§ 47.5, infra), initiated by the filing of a memorial by an individual with the Clerk, the committee determined that the Member-elect, who was born in Vienna, Austria on Apr. 3, 1900, and was admitted to citizenship on June 17, 1926, was qualified to take the oath of office at the time of the commencement of the second session of the 73d Congress on Jan. 3, 1934. The Member-elect, who had been a citizen for only six years and five months at the time of his election on Nov. 8, 1932, and for only six years and eight months at the time of the commencement of the first session of the 73d Congress on Mar. 9, 1933, had been a citizen for over seven and a half years at the time of the convening of the second session of the 73d Congress, thus satisfying the requirements of article I, section 2, clause 2 of the Constitution.

## § 10. Violation of Federal or State Election Laws

Frequently alleged as a basis for an election contest are violations of state and federal laws relating to the conduct of such elections. Whether a challenge based on such grounds will be sufficient to overturn the result of the election depends in part on whether the candidate himself participated, whether the errors were committed by election officials, and whether the violations were of laws regarded as merely directory or mandatory.

Until 1972, campaign practices in congressional elections were governed by the Corrupt Practices Act of 1925, as amended.[9] The Federal Election Campaign Act of 1971, which became effective 60 days after the date of enactment (Feb. 7, 1972), repealed the Corrupt Practices Act of 1925 and established a new and comprehensive code for campaign practices and expenditures.[10]

**9.** 2 USC §§ 241–256 (repealed).

**10.** 2 USC §§ 431 et seq.; Pub. L. No. 92–225; 86 Stat. 3, Feb. 7, 1972. Viola-

*Corrupt Practices Act*

**§ 10.1 The violation of those provisions of the federal campaign practices statute, or a state counterpart, which limit the amount which a candidate may spend in his campaign, may be alleged as grounds for an election contest.**

In Schafer v Wasielewski (§ 52.4, infra), a 1944 Wisconsin contest, contestant alleged that contestee had expended more money during his campaign than was permitted by the Federal Corrupt Practices Act and by the election laws of Wisconsin, and that contestee had failed to file correct reports of expenditures as required by law. The committee found, however, that although the Wisconsin statutes limited the amount of money which could be spent by a candidate personally, they placed no limitation upon expenditures of individuals or groups that "might voluntarily interest themselves" in behalf of a candidate. The committee determined that certain sums listed actually represented expenditures of a "voluntary committee" rather than expenditures of a personal campaign committee; accordingly, the committee found that such expenditures were not personal expenditures and thus not limited by state law.

**§ 10.2 A House committee has suggested that censure by the House might be appropriate where a Member has failed to comply with the requirements of federal law as to the filing of forms and statements showing campaign expenditures.**

In McCandless v King, a 1936 Hawaii contest, (§ 48.2, infra), a one-year delay in filing forms under the Corrupt Practices Act showing campaign expenditures was held to subject the contestee to censure, though not forfeiture of his seat. The finding of the committee was based on the fact that although contestee had failed to file within 30 days a complete and itemized account of his expenditures, he did write a timely letter to the Clerk itemizing certain expenditures and stating that on his arrival in Washington he would fill out the required form.

**§ 10.3 Mere negligence on the part of a contestee in preparing expenditure accounts to be filed with the Clerk under the Federal Corrupt Practices Act will not, in the**

tions relating to campaign expenditures are also treated in Ch. 8, supra.

**absence of fraud, operate to deprive him of his seat where he has received a substantial plurality of votes.**

In Schafer v Wasielewski (§ 52.4, infra), a 1944 Wisconsin contest, the contestant, who had been defeated in the election by approximately 17,000 votes, alleged *inter alia* that contestee had failed to file correct reports of expenditures as required by law. The committee found, however, that the contestee had negligently listed "voluntary committee" expenditures as "personal" expenditures, though only the latter were limited by state law. The committee found no evidence of fraud, and concluded that it should not deprive contestee of his seat as a result of negligence in preparing the accounts.

**§ 10.4 Mere negligence on the part of a contestee and his counsel in preparing campaign expenditure accounts to be filed with the Clerk is not sufficient to deprive him of his seat in the House, where he received a substantial majority of votes, and there was no evidence of fraud.**

In Thill v McMurray (§ 52.6, infra), a 1944 Wisconsin contest, contestee's statement of expenditures filed with state officials conflicted with those filed with the Clerk of the House. The Committee on Elections considered evidence that the statement filed with the Clerk had been erroneously prepared and signed. It admonished contestee for signing an expenditure statement under oath without being familiar with its contents or the irregularities therein, but refused to recommend that he be deprived of his seat.

**§ 10.5 In determining whether contestee's failure to comply with the Corrupt Practices Act should result in forfeiture of his seat, the elections committee may consider such circumstances as the personal character of the contestee, his experience as a candidate for public office, the extent of any improper campaign expenditures, and the effect of such violations on the rights of the contestant.**

See McClandless v King, a 1936 Hawaii contest (§ 48.2, infra), where the Committee on Elections, in determining whether a violation of the Corrupt Practices Act should result in censure or forfeiture of a seat, took into account contestee's naval record, his incomplete knowledge of election

laws and procedures, and the fact that the Clerk had not mailed the required forms to contestee.

### *Distinction Between Mandatory and Directory Laws*

**§ 10.6 An elections committee has distinguished between mandatory and directory provisions of state law pertaining to elections.**

In the 1961 Indiana investigation of the right of Roush or Chambers to a seat in the House (§ 59.1, infra), the elections committee cited the Nebraska case of *Waggoner* v *Russell*, 34 Neb. 116, 51 N.W. 465 (1892), which stated in part:

> In general, those statutory provisions which fix the day and the place of the election and the qualifications of the voters are substantial and mandatory, while those which relate to the mode of procedure in the election, and to the record and the return of the results, are formal and directory. Statutory provisions relating to elections are not rendered mandatory, as to the people, by the circumstance that the officers of the election are subjected to criminal liability for their violation.

The committee followed this guideline in determining whether certain Indiana provisions governing ballot validity and counting were mandatory or merely directory.

**§ 10.7 Although violation of state laws governing the conduct of election officials, absent fraud, is not sufficient ground for invalidating ballots, statutes regulating the conduct of voters must be substantially complied with, as such laws are mandatory.**

In the 1958 Maine contested election case of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, the committee followed a state supreme court advisory opinion that certain alleged violations of the provisions of the law touching upon procedure to be followed in handling and preserving of applications and envelopes of absentee votes by election officials were to be viewed as directory rather than mandatory. On the other hand, the committee cited state court decisions which distinguished between acts of the voter and acts of the election officials, and which required the voter to substantially comply with the statute in order for his vote to be considered as properly cast. Therefore, the committee rejected 109 absentee and physical disability ballots.

**§ 10.8 An elections committee has adopted a state court opinion which had construed state laws regarding poll procedure and disposition of absentee ballots, envelopes, and**

**applications as directory rather than mandatory, violations of which would not invalidate the absentee ballots cast.**

In the 1958 Maine contested election case of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, there were a number of alleged violations by election officials relative to absentee voting, such as failure of the board of registration to retain the application or envelope, or failure of various clerks to send in the application and envelopes along with the absentee ballots. In this situation, the committee followed an advisory opinion of the Supreme Court of Maine, issued under similar circumstances, which concluded that provisions of the statute touching the procedure to be employed at the polls and the disposition of applications and envelopes following the election were directory and not mandatory in nature. Hence, the committee followed the advisory opinion that violation of the statute by election officials, in the absence of fraud, was not a sufficient ground for invalidating the ballots.

**§ 10.9 Where a state law required alternation of names on ballots and publication and display of ballots for a certain period prior to an election, the majority of an elections committee ruled that a violation of the statute was deemed to be a pre-election irregularity and, absent fraud, insufficient to overturn the election.**

In the 1951 Ohio contested election case of Huber v Ayres (§ 56.1, infra), although conceding that there had been discrimination against the contestant because his name had not appeared "substantially an equal number of times at the beginning, at the end, and in each intermediate place . . ."[11] in the group of contestants among which his name belonged, the committee majority nevertheless refused to recommend that the election results be overturned, partly because the contestant had not exhausted his remedies under state law. The minority disagreed with the conclusion, contending that it was impossible for the contestant to ascertain the unequal method of rotation in advance of the election in time to invoke state law remedies. Nevertheless, the House agreed to a resolution that the contestee was duly elected and entitled to his seat.

**§ 10.10 Mandatory election laws confer rights of suffrage**

**11.** Ohio Constitution, art. V, § 2a, adopted Nov. 8, 1949.

**and by their terms invalidate ballots not cast in compliance therewith, while directory election laws prescribe procedures to be followed by election officials, departure from which will not vitiate ballots without a further showing of fraud or uncertainty of result.**

In Chandler v Burnham, a 1934 California contest (§ 47.4, infra), contestant alleged various instances of illegal ballot counting, invalid election boards, unattested tally sheets, and irregular ballots. In evaluating these charges, the Committee on Elections considered the distinction between "mandatory" laws, which void an election unless certain procedures are followed, and "directory" statutes, which fix penalties for violation of procedural safeguards, but do not invalidate an election in the event of noncompliance. The committee further declared that the rules prescribed by law for conducting an election are designed to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal voting, and to ascertain with certainty the result. A departure from the mode prescribed will not vitiate an election, the committee stated, if the irregularities do not involve these considerations. The committee concluded that contestant had alleged violations of statutes that were merely "directory" in nature.

**§ 10.11 Noncompliance with administrative requirements imposed by state election laws will not vitiate an election unless the procedures involved are declared by law to be essential to the validity of the election.**

In Clark v Nichols (§ 52.1, infra), a 1943 Oklahoma contest, the Committee on Elections found that certain administrative requirements imposed by state law, including the keeping of precinct registration books, were not declared by law to be essential to the validity of the election; the committee regarded such requirements as merely directory, not mandatory, and refused to disturb what it considered the certain decision of the electorate.

**§ 10.12 Violations of a state's registration and election laws prohibiting transportation of voters to places of registration, providing qualifications for registrars, confining registration to certain hours, and requiring detailed registration lists were held not to affect the correct result of the election, and**

**therefore did not nullify the election.**

In Wilson v Granger (§ 54.5, infra), a 1948 Utah contest, a contestee with a 104-vote majority prevailed despite "numerous and widespread errors and irregularities in many parts of the district, which revealed a lack of knowledge of the law and a failure to enforce properly the registration and election statutes by those charged with that duty."

### *Violations and Errors by Officials*

**§ 10.13 In determining whether the violation of election laws by election officials will justify a recount or nullify the election, the House will look to the sufficiency of the evidence of legal fraud or intentional corruptness.**

In Brewster v Utterback (§ 47.2, infra), a 1933 Maine contest, it appeared that in certain precincts irregularities occurred in the election procedure in the Third Congressional District of Maine. The committee found that, even assuming the validity of contestant's allegations as to voting booth and ballot irregularities, contestee was left with a clear majority. The committee further found that there was insufficient evidence of fraud or corruption to justify a recount of ballots or to sustain the contestant's allegations.

**§ 10.14 Ballots will not be voided for failure of election officials to be sworn, their acts under color of office being binding as to election returns that are otherwise proper.**

In Chandler v Burnham, a 1934 California contest (§ 47.4, infra), a committee on elections rejected contestant's claims that ballots in certain precincts should be voided because certain election officials had not been sworn. The committee found that all such officials, with the exception of inspectors, had in fact subscribed to the required oath, and added that, in any event, an election will not be invalidated based on such failure, the acts of election officials under color of office being binding.

**§ 10.15 Where there have been violations of state laws (governing absentee voting) by election officials throughout the district, the results of the election will not be overturned when the contestant has failed to exhaust his state remedies to prevent improper absentee ballots from being cast or to punish those responsible.**

In the 1957 Iowa contested election of Carter v LeCompte (§ 57.1, infra), the election committee majority found that there had been widespread violations by election officials of state laws regarding absentee voting, but as contestant had not proven fraud by contestee and had not challenged absentee ballots under state law, he had not sustained his burden of proving that the election result was changed. Therefore, the results of the election could not be "overturned because of some pre-election irregularity."

**§ 10.16 In the absence of fraud, charges of irregularities as to registration and the failure of election officials to assign ballot numbers to electors will not invalidate the votes cast.**

In the New York contested election of Macy v Greenwood (§ 56.4, infra), arising from the 1950 election, the contestee won by a plurality of only 135 votes, which induced the contestant to allege violations as to voter registration procedures. However, the House agreed to a resolution dismissing the contest and declaring the contestee entitled to his seat.

### *Improperly Conducted Special Elections*

**§ 10.17 Where a Governor's proclamation fails to give proper notice, as required by state law, of a special election called to fill a vacancy in the House, the House may conclude that the election was invalid.**

The 1934 Kemp, Sanders investigation (§ 47.14, infra), arose from the death of Bolivar E. Kemp, which created a vacancy in the Sixth Congressional District of Louisiana. The Governor of Louisiana issued a proclamation calling for a special election to fill this vacancy within eight days, although state law required that primary elections to nominate candidates for special elections be held "not less than 10 days" after the call for such special election. The Committee on Elections concluded that the Governor, in his proclamation, was required to give 10 days notice of the special election, and his failure to do so rendered it invalid.[12]

**§ 10.18 An election to fill a vacancy in Congress, conducted by a "Citizens' Committee," is invalid where state law does not provide for such a procedure.**

In the Kemp, Sanders investigation (§ 47.14, infra), a special elec-

12. The subject of elections to fill vacancies is discussed extensively in Ch. 8, supra.

tion was called by the Governor of Louisiana to fill the vacancy created by the death of Bolivar E. Kemp, from the Sixth Congressional District of Louisiana. One of the candidates was J. Y. Sanders, and a certificate of his election, prepared by the "Citizens' Election Committee" of the Sixth Congressional District was laid before the House. This committee had met in the district and fixed the date for the "election" 30 days after the meeting. This election was found to be illegal and void, there being no provision under the laws of Louisiana for the holding of such an election.

### *Improperly Conducted Primary Elections*

**§ 10.19 Where state law requires the nomination of candidates by direct primary elections called by party committees, the nomination of a candidate by a committee is illegal and void.**

In the 1934 Kemp, Sanders investigation (§ 47.14, infra), arising from a Louisiana special election, it was shown that state law required that candidates be nominated in a primary election called by a political party committee. Since the contestant was nominated, not by a direct primary election but by the party committee itself, his "election" was found to be void.

### *Illegal Use of Funds*

**§ 10.20 The illegal use of campaign funds may be alleged as a basis for an election contest.**

In Lovette v Reece, a 1934 Tennessee contest (§ 47.11, infra), contestant alleged the illegal use of funds to influence the election; it was contended that contestee's brother had collected large sums of money to finance contestee's election. However, the committee found that such claims were associated more closely with the race for Governor and involved transactions occurring after the election not connected with contestee.

### *Illegal Nominating Procedure*

**§ 10.21 Alleged violations of state law with respect to the nomination of a candidate cannot sustain a contest brought by a losing primary candidate against the contestee, who was elected in the subsequent general election.**

In Lowe v Thompson (§ 62.1, infra), a committee on elections denied a petition based on alleged illegality in the nomination of the candidate of petitioner's party,

where the opponent of such party nominee won the subsequent general election.

## § 11. Improper Attempts to Influence or Confuse Voters

### *Confusing the Voters*

**§ 11.1 In determining whether to credit a candidate with certain ballots, an election committee considered whether his opponent had induced or procured a "third party" candidate or had improperly participated in the makeup of "third party" ballots.**

In Fox v Higgins (§ 47.8, infra), a 1934 Connecticut contest, the Committee on Elections found that the contestant had failed to sustain his allegations that contestee, in an attempt to confuse the voters, had procured the candidacy of a "third party" candidate. The committee also found that contestee, in his capacity as secretary of state, had not deliberately prepared ballots in such a manner as to be confusing or to obtain unfair advantage.

### *Financing Extra Editions of Magazine*

**§ 11.2 An elections committee found no evidence that the contestee financed extra editions of a magazine which supported his candidacy.**

In the 1951 New York contested election case of Macy v Greenwood (§ 56.4, infra), which the contestant lost by only 135 votes, he alleged that the contestant had violated the Corrupt Practices Act by either financing or inspiring the printing of extra editions of "Newsday," which had been devoted exclusively to the defeat of the contestant. The committee found no evidence supporting the allegation and recommended that the contest be dismissed, and the House followed this recommendation.

### *Racial Discrimination*

**§ 11.3 Discrimination against potential voters based on race may afford grounds for bringing an election contest.**

In the 1965 Mississippi election contest of Wheadon et al. v Abernethy et al. [The Five Mississippi Cases] (§ 61.2, infra), the Committee on House Administration recommended dismissal of the election contests arising out of the November 1964 Mississippi congressional elections. The dismissal recommendation was based in part on the contestants' failure to follow the established procedure

for bringing election contests, and in part on the failure to avail themselves of the legal steps to challenge alleged discrimination prior to the elections.

The Committee report did state, however, that in arriving at such conclusions, the committee did not condone disenfranchisement of voters in the 1964 or previous election, nor was a precedent being established to the effect that the House would not take action, in the future, to vacate seats of sitting Members. It noted that the Federal Voting Rights Act of 1965 had been enacted in the interim and that if evidence of its violation were presented to the House in the future, appropriate action would be taken.

### *"Prizes" to Campaign Workers*

**§ 11.4 A contestee's offer of prizes to his precinct captains has been found by an elections committee not to be a violation of that section of the Corrupt Practices Act prohibiting expenditures to influence votes.**

In McAndrews v Britten (§ 47.12, infra), a 1934 Illinois contest, the contestant had alleged in his notice of contest that the contestee had "offered prizes to the various precinct captains whose precincts voted the largest votes in proportion to the Republican votes that were given in these precincts." The offering of such prizes was acknowledged by the contestee on the floor of the House during debate. The committee found that this offering of prizes was not a violation of 2 USC § 150, which made it unlawful "for any person to make or offer to make an expenditure . . . either to vote or withhold [a] vote or to vote for or against any candidate. . . ."

## § 12. Voting Booth and Balloting Irregularities

As a basis for contesting an election, a wide variety of charges have been made in election contests with respect to use of voting booths and voting machines and equipment. Similarly, alleged improprieties in balloting are frequently cited as a reason for overturning the result of an election.

### *Voter Confusion as Excuse for Official's Entering Booth*

**§ 12.1 In determining whether an election official, in entering a voting booth and conversing with voters, was act-**

**ing fraudulently and in conspiracy with a candidate, the elections committee may consider the extent to which there existed voter confusion as to the proposition on the ballot or in the operation of voting machines.**

In Gormley v Goss (§ 47.9, infra), a 1934 Connecticut contest, contestant failed to establish that an election official's actions in entering a booth and talking to voters were fraudulent and conspiratorial. The committee noted that there existed voter confusion as to the placement of a proposition on the ballot and that there were no complaints of interference with voter intent.

### *Balloting irregularities*

**§ 12.2 A committee finding of evidence of irregularities in the conduct of an election will not provide a sufficient basis for overturning that election where there is no evidence connecting contestee with such irregularities.**

In Miller v Cooper (§ 48.3, infra), a 1936 Ohio contest, the Committee on Elections found evidence of irregularities in the destruction of ballots, tabulations of votes cast, and in the method of conducting the election. However, there was no evidence whatsoever connecting the contestee therewith, and the committee recommended that he be seated.

**§ 12.3 Where votes are cast by persons not qualified to vote, being only temporarily in the district, such votes are considered invalid.**

In Swanson v Harrington (§ 50.4, infra), a 1940 Iowa contest, contestant claimed that 70 of the 528 votes cast in a certain precinct were illegal as they were cast by Works Progress Administration workers only temporarily in the district; the committee ruled, however, that while such votes were illegal and could be disregarded, they would not affect the outcome of the election.

**§ 12.4 An allegation that contestee had received a disproportionately large number of "split votes" must be supported by the evidence.**

In McAndrews v Britten (§ 47.12, infra), a 1934 Illinois contest, contestant alleged that contestee had received a "split vote" so disproportionately large as compared to the "straight ticket votes" that a presumption of fraud followed. This allegation was rejected as not supported by the evidence, the testimony of an

expert being regarded as "frail and unconvincing"; it appeared that a large split vote had been the case for many members of contestee's political party, as they had to have "run ahead of the ticket" to have been elected.

**§ 12.5 An elections committee will not presume ballots marked for the Presidential nominee of contestant's party to have been intended as "straight ticket" votes where the state law provides for a separate circle for casting "straight ticket" ballots.**

In Ellis v Thurston (§ 47.6, infra), an election contest originating in the 1934 Iowa election, the contestant argued that on a number of ballots on which the voters had marked the squares opposite the Presidential and Vice Presidential candidates but which indicated no choice for Representative, the voters had intended to vote a straight party ticket. The committee ruled against this contention, however, noting that the state statute provided that a cross be placed in a separate party circle in order to cast a straight party ticket.

**§ 12.6 Where state law voids ballots cast for more than one "straight party" ticket, an elections committee will not validate ballots that are marked for "straight ticket" and, in addition, for a local "wet party" ticket, the latter being adjacent to a column permitting a vote for repeal of the 18th amendment, in the absence of evidence that such voters intended to vote for repeal and mistakenly voted for two "straight tickets."**

In Fox v Higgins (§ 47.8, infra), a 1934 Connecticut contest, the Committee on Elections, while conceding the probability of some voter confusion, found that the juxtaposition of the "wet party" entry with the column relating to the repeal of the 18th amendment, had been arranged in the customary way by a competent state elections official.

**§ 12.7 Statutory violations by voters in failing to comply with state absentee voting laws were held sufficient to invalidate the ballots cast.**

In the 1958 Maine contested election case of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, the report of the Committee on House Administration listed nine areas stressed by the contestant in which there had been a failure on the part of the voter to comply

with the absentee voting laws of Maine: application for absentee or physical incapacity ballot not signed by the voter; application for physical incapacity ballot not certified by physician; envelope not notarized; no signature of voter on envelope; jurat not in form as prescribed by statute; name of voter and official giving the oath are the same; variance in writing between signature on application and signature on envelope; failure of voter to specify on envelope his reason for absentee voting; and voter not properly registered or qualified to vote.

The committee concluded that there were 109 instances where the voter failed to substantially comply with the elect on laws, leading to rejection of the ballots as compliance was mandatory.

**§ 12.8 Where state law required alternation of names of all candidates on ballots so that each name appeared an equal number of times at the beginning, end, and at intermediate places thereon, failure to comply with the requirement did not result in overturning the election.**

In the 1951 Ohio contested election case of Huber v Ayres (§ 56.1, infra), a newly adopted state constitutional provision required alternation of the candidates' names an equal number of times in various positions on the ballot. However, the majority recommended, and the House agreed to, a resolution dismissing the contest on the basis that the remedy under state law had not been exhausted.

## D. DEFENSES

### § 13. Generally

Under the new Federal Contested Elections Act (2 USC §§ 381–396), the contestee may, prior to answering the contestant's notice of contest, make the following defenses by motion served on the contestant and such motions may form the basis of a motion to dismiss made before the Committee on House Administration: insufficiency of service of notice of contest; lack of standing of the contestant; failure of the notice of contest to state grounds sufficient to change the result of the election; and failure of the contestant to claim right to the contestee's seat [see 2 USC § 383(b)]. These statutory defenses are supplemental to those described in the precedents below.

### *Permissible Defenses to Election Contests*

**§ 13.1 Among the defenses which may be raised as grounds for dismissing an election contest are that contestant has failed to make out a prima facie case, did not file the contest in good faith, has failed to exhaust available legal remedies at the state level, or that contestant was not a proper party**

In McEvoy v Peterson (§ 52.2, infra), a 1944 Georgia contest, the House dismissed an election contest as recommended by the unanimous committee report, where it appeared that contestant's name had not appeared on any ballots and he had not received any votes, that contestant had failed to exhaust available legal remedies, had not filed the election contest in good faith, and had failed to make out a prima facie case.

### *Candidate's Participation in irregularities*

**§ 13.2 The mere existence of an irregularity in any campaign should not be attributed to a particular candidate where he did not participate in such irregularity.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the election committee condemned the use of an unsigned pre-election circular by an individual who had distributed information in Mr. Alford's behalf, apparently without the candidate's knowledge. The committee ruled, however, that the mere existence of an irregularity in any campaign should not be attributed to a particular candidate where he did not participate therein. The House agreed to a resolution that Mr. Alford was entitled to his seat.

### *Alleged Error Insufficient to Change Result*

**§ 13.3 Where more ballots were cast than there were names listed on the polls, an elections committee may still recommend dismissal of the contest if the errors were inadvertent and insufficient to change the result even if all the excess ballots were added to the contestant's total.**

In the 1965 Iowa election contest of Peterson v Gross (§ 61.3, infra), the election committee found that although there may have been human errors committed at the polls on election day there was no evidence of fraud or

willful misconduct. In regard to a specific allegation by the contestant that more ballots were cast than names listed on the polls, the committee concluded that some inadvertent errors had been made but the errors were insufficient to change the result even if all the excess ballots were added to the total of the contestant.

### *Failure to Exhaust State Remedy*

**§ 13.4 In rejecting contestant's demand for a recount of a vote by the House, an elections committee may take into consideration contestant's failure to exhaust his remedy of obtaining a recount through a state court.**

In Swanson v Harrington (§ 50.4, infra), a 1940 Iowa contest, contestant claimed that the House should require a recount, citing an informal recount he had taken in connection with an election involving a local sheriff's office. The committee found that contestant had not exhausted his remedy of obtaining a recount through the state courts, as permitted by the Iowa code, and rejected his argument that he had been precluded from invoking state court aid inasmuch as the state courts had not construed the relevant state election law as it applied to a seat in the House. [Compare § 5.13, supra.]

**§ 13.5 Where the contestee did not participate in widespread violations of state laws governing absentee voting, which violations had been committed by election officials, and contestant had not exhausted his state remedies to prevent improper absentee ballots from being cast or to punish those responsible, the election committee would not overturn the results of the election.**

In the 1957 Iowa election contest of Carter v LeCompte (§ 57.1, infra), the committee majority found violations of state laws governing absentee ballots committed by officials throughout the district, but determined that the contestant had not proven fraud by the contestee and had not challenged absentee ballots under state law, with the result that he had not sustained his burden of proving that the election results would have been different. The minority on the committee cited the contest of Steel v Scott (6 Cannon's Precedents § 146), for the proposition that total disregard of election laws by election officials, though in the absence of fraud, was sufficient basis for a

recount, which in this contest would have shown contestant Carter the winner by 1,260 votes.

### *Pre-election Irregularity*

**§ 13.6 Results of an election will not be overturned on the basis of a pre-election irregularity, where the contestant could have made timely objection thereto, under state law, but failed to do so.**

In the 1957 Iowa election contest of Carter v LeCompte (§ 57.1, infra), the election committee majority found that there were violations of state laws governing absentee voting committed by election officials throughout the district, although the contestee had not personally participated in these violations. The majority determined that the contestant had not shown that he had exhausted his state remedies to prevent improper absentee ballots from being cast or to punish those responsible. Citing Huber v Ayres (§ 56.1, infra), a 1951 Ohio contest, the majority determined also that the contestant had not properly entered his objections to errors as to the form of the absentee ballots prior to the election, as permitted by Iowa law, and that therefore the results of the election could not be "overturned because of some pre-election irregularity."

**§ 13.7 Where contestant had not properly entered objections to errors in the form of the absentee ballot prior to the election, as permitted by state law, the results of the election could not be "overturned because of some preelection irregularity" (see § 13.6, supra).**

### *Failure to Specify Grounds Relied Upon by Contestant*

**§ 13.8 The contestant must specify particularly the grounds upon which he relies in an election contest.**

In Roberts v Douglas (§ 54.4, infra), a 1947 California contest, contestee Helen Gahagan Douglas moved to dismiss on the grounds (1) that the contestant had not instituted a valid contest, as the statute then in force (2 USC § 201) and House precedents required him to specify the grounds upon which he relied in the contest and (2) contestant had taken no testimony within the 90 days permitted to support his notice of contest. By voice vote, the House resolved that the contest be dismissed and the contestee take her seat.

## § 14. Contestant's Credentials and Qualifications

Just as the contestee's credentials and qualifications may be grounds for bringing an election contest (see § 9, supra), so may the contestant's credentials and qualifications be raised as a basis for dismissing an election contest.

### *Contestant's Standing*

**§ 14.1 An elections contest may be dismissed where it appears that the contestant was not a candidate of a registered political party in the state.**

In McEvoy v Peterson (§ 52.2, infra), a 1944 Georgia contest, the House dismissed an elections contest where it appeared, *inter alia*, that contestant had attempted to run for the First Congressional District of Georgia seat as an "independent Republican" though there was no such political party in Georgia.[13]

### *Invalid Elections*

**§ 14.2 Contestants selected through an "election" held without any authority of law in the state lack standing to bring an election contest.**

In the 1965 Mississippi election contest of Wheadon et al. v Abernethy et al. (§ 61.2, infra), the House dismissed election contests brought by contestants that had been selected at an unofficial "election" held by persons in Mississippi from Oct. 30 through Nov. 2, 1964.

The contestants were all citizens, none of whom had been candidates in the official November 1964 election for Members of the U.S. House of Representatives. The "election" that had selected the contestants, by contrast, was held without any authority of law in the state.

The contestants had urged the unseating of the contestees and vacating of the official election on the basis of the alleged disenfranchisement of large numbers of Negro voters from the electoral process through intimidation and violence.

## § 15. Abatement

Under the Federal Contested Elections Act, a case abates in the event of the death of the contestant.[14] Moreover, there have been

13. The "standing" of a contestant to bring an election contest is discussed below, under "Parties," § 19, infra.

14. 2 USC § 395.

several election contests which were dismissed or otherwise dropped because of a failure by the contestant to carry forward with the case.

### *Failure to Take Testimony Within Prescribed Time*

**§ 15.1 Where parties to an election contest have not taken testimony within the time prescribed by law, the Clerk informs the Speaker that the contest has apparently abated.**

See Casey v Turpin (§ 47.3, infra), a 1934 Pennsylvania election contest in which the contestant neither produced testimony nor appeared to show cause why the contest should not be dismissed, the House agreed to a resolution by voice vote and without debate that the contestant was not, and the contestee was, entitled to a seat.[15]

**§ 15.2 Where parties to an election contest have not transmitted testimony to the Clerk within the time prescribed by law, the Clerk informs the Speaker that the contest has apparently abated.**

In LaGuardia v Lanzetta, a 1934 New York contest (§ 47.10, infra), the Clerk advised the Speaker by letter that a copy of a notice of contest and reply thereto had been filed, but that, since no testimony had been transmitted within the time prescribed by law, the contest had apparently abated.[16]

**§ 15.3 Where the parties to an election contest fail to forward testimony within the time required by law, and the Clerk informs the Speaker that the contest has apparently abated, the contest may be referred to committee.**

In Shanahan v Beck (§ 47.15, infra), a 1934 Pennsylvania contest, the Speaker laid before the House a letter from the Clerk transmitting a copy of the notice of contest and reply thereto, with the statement that no testimony had been received within the time prescribed by law and that the contest appeared to have abated. The contest was referred to a committee, which confirmed that there was no evidence before the committee of the matters charged in the notice.

**15.** Time limitations generally, see § 27, infra.

**16.** See also Browner v Cunningham (§ 55.1, infra), a 1949 Iowa contest.

## § 16. Limitations and Laches

Where the contestant delays in collecting and forwarding evidence, laches may provide a basis for dismissal of the contest.

### *Laches*

**§ 16.1 An elections committee may dismiss a contest for laches on the part of contestant on the ground that he failed, within the time required by law, to take evidence, to file a brief, or to appear in person before the committee.**

In Neal v Kefauver (§ 50.1, infra), a Tennessee contest, contestant on Oct. 19, 1939, served notice on the returned Member (Mr. Estes Kefauver) of his purpose to contest the election. On Feb. 23, 1940, contestee submitted a communication requesting a dismissal of the contest and setting forth reasons therefor. On June 18, 1940, the Committee on Elections submitted a report stating that the committee had dismissed the contest on the grounds that contestant had failed to take evidence as required by law, that there was no evidence before the committee of the matters charged in the notice of contest, and no briefs filed as provided by law, and that contestant had failed to respond to a notification to appear in person before the committee.

### *Inexcusable Delay in Filing Briefs and Taking Testimony*

**§ 16.2 An elections committee will recommend dismissal of a contest where testimony and briefs have not been filed within the time prescribed by law and where circumstances do not excuse such failure.**

In Shanahan v Beck, a 1934 Pennsylvania contest (§ 47.15, infra), the committee found that laches was not excusable under the circumstances, and permitted contestant to withdraw unprinted evidence which he had submitted while testifying before the committee.[17]

17. See also § 27, infra, for a discussion of time considerations in the taking of testimony.

## E. PRACTICE AND PROCEDURE

### § 17. Alternatives to Statutory Election Contests

In addition to the statutory election contest procedures discussed in this chapter, election committees have often dealt with election disputes arising under other procedures, and involving the right of a Member-elect to his seat in the House.[18]

The right to a seat in the House based upon a challenge of an election may be determined pursuant to: (1) an election contest initiated by a defeated candidate and instituted in accordance with law; (2) a protest filed by an elector of the district concerned; (3) a protest filed by any other person; and (4) a motion of a Member of the House.

Of the four procedures described above, only the first, strictly speaking, is an election contest as that term is used in this chapter. The last three, while often considered by an election committee after referral by the Speaker or the House, are treated generally as determinations of the elections and return of Members, and should be distinguished from proceedings in the nature of a proposition to exclude, where the right to a seat based upon the Member-elect's qualifications under the Constitution are called into question, or to expel, where a Member's behavior or qualifications are at issue. Such proceedings are treated elsewhere in this work.[19]

#### *Alternatives to Filing Election Contests*

**§ 17.1 Where the losing candidate did not file a contest under the statute governing contested elections, but an investigation of the right of a Member-elect to hold the seat was held as a result of charges made by a single voter from the district, the committee report expressed its strong preference for determining contested elections by proceeding under the statute.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the House authorized the election committee investigation as a result of charges made by a single voter from the district, many of the charges made on the basis of hearsay. The losing candidate of-

**18.** See §§ 17.1, et seq., infra.

**19.** See Ch. 7, supra, and Ch. 12, infra.

fered to assist in the investigation, although he did not file an election contest under the statute, 2 USC §§ 201 et seq. In the committee report, a strong preference was expressed for determining disputed elections by following the procedures under the contested elections statute. The House ultimately agreed to a resolution seating the Member-elect, who won the election on the basis of write-in votes.

**§ 17.2 The House may direct the Committee on House Administration to make an "investigation of the question of the right" of two candidates to a disputed seat in the House, where neither candidate initiates a contest under the statute.**

In the 1961 Indiana investigation of the right of J. Edward Roush or George O. Chambers to a seat in the House (§ 59.1, infra), the investigation was conducted by the Subcommittee on Elections, which determined that Mr. Roush was entitled to the seat. The committee report, with which the House expressed its agreement by adopting a resolution, recommended that the candidates be reimbursed for their expenses in accordance with the provisions of law governing election contests, although neither candidate sought to invoke that statute.

**§ 17.3 An investigation of the qualification of a Member-elect to be sworn and of his right to a seat was instituted by the filing of a memorial by an individual challenging his citizenship qualifications.**

In the 1933 investigation of the citizenship qualifications of a Member-elect from Pennsylvania, In re Ellenbogen (§ 47.5, infra), the investigation was initiated, following the election, by a memorial and accompanying papers filed by Harry Estep (a former Member) with the Clerk, who transmitted it in a letter to the Speaker, who in turn laid it before the House and referred it to the Committee on Elections.

**§ 17.4 An investigation of the right of a Member-elect to a seat in the House has been initiated by a letter from a voter in the district.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the House authorized the Committee on House Administration to conduct an investigation of the election on the basis of a letter from a voter in the district, after the Member-elect won as a write-

in candidate. The defeated candidate did not file a contest, but offered to help the investigation. The committee report strongly recommended that in such cases proceedings be under the provisions of the contested elections statute.

### *Petition*

**§ 17.5 Contestant, not a candidate in the general election and therefore incompetent to institute a statutory contest, initiated an elections committee investigation by petition.**

In Lowe v Thompson (§ 62.1, infra), a losing primary candidate was held to be without standing to institute a statutory contest against a candidate elected in the general election. A committee on elections, however, considered and then denied the petition brought by such primary candidate.

## § 18. Commencing the Contest

Under the Federal Contested Elections Act, the contest is initiated by a notice of contest which is filed with the Clerk and served on the contestee.[20] This was also the practice under the Contested Elections Act, 2 USC §§ 201 et seq.[1]

### *Compliance With Statutory Requisites*

**§ 18.1 Where the defeated candidate complains about his opponent's conduct in an election in a letter to the Clerk, but takes no other action or otherwise complies with the laws regulating contested election cases, the Committee on House Administration may decline to take action in the contest.**

In the 1959 Illinois election contest of Myers v Springer (§ 58.3, infra), the defeated candidate sent a letter to the Clerk complaining that the contestee had violated the Corrupt Practices Act by appointing the editor of a local paper, which paper had denied coverage to the contestant, to a position as acting postmaster. The letter was transmitted by the Clerk to the Speaker, who laid it before the House and referred it to the Committee on House Administration, and ordered the con-

**20.** 2 USC § 382(a).

**1.** The "rules of the elections committees for hearing a contested election case" [6 Cannon's Precedents § 110] are no longer applicable.

testant's letter printed as a House document. There was no record, however, showing that the contestant complied with the requirements for bringing an election contest, and the committee took no action on the contest.

**§ 18.2 Where an election contest has been initiated but not brought officially to the House, the House will not intervene simply for the purpose of procuring evidence for the use of the parties to the contest.**

In Sullivan v Miller (§ 52.5, infra), a 1943 Missouri contest, the parties filed a joint application for a recount although no election contest had been formally presented to the House at that time; the House refused to grant such application, the committee having recommended that the House not intervene "simply for the purpose of procuring evidence for the use of the parties to the contest."

**§ 18.3 On matters of procedure, an election contest is governed by the applicable federal statutes dealing with contested elections, and not the Federal Rules of Civil Procedure.**

In the 1957 Iowa contested election case of Carter v LeCompte (§ 57.1, infra), the election committee determined that the contestant's motion to "amend the pleadings to make them conform to the proof" was premature, as the testimony had not yet been printed and referred to the committee. The committee reasoned that it was governed by the relevant federal statute, then 2 USC §§ 201 et seq., and not by Rule 15 of the Federal Rules of Civil Procedure, under which such motions and answers thereto are generally granted.

### *Limit on Number of Contests Initiated by an Individual*

**§ 18.4 There appears to be no limit on the number of contests that may be initiated by the same individual. However, the House tends to look with increasing disfavor and skepticism upon contests that are filed year after year by the same individual upon the same grounds, particularly where he fails to produce evidence of his claims.**

See Prioleau v Legare (6 Cannon's Precedents § 130) wherein a person had unsuccessfully instituted five consecutive election contests, and in which the House ex-

pressed the hope that the fifth would be the last.[2]

## § 19. Parties

The Federal Contested Elections Act uses the term "candidate" with reference to those persons who may initiate a suit under the statute.[3] This term is defined as referring to an individual (1) whose name is printed on the official ballot for election to the House, or (2) who seeks election to the House by write-in votes, provided he is qualified and eligible to receive such votes, and provided write-in voting for such office is permitted.[4]

Under the prior contested elections statute,[5] the phrase "any person" was used with reference to those authorized to file notice of intention to contest an election.

However, even under this legislation, a person who had not been a candidate in the general election was deemed incompetent to institute a contest in the House, though he had been a candidate in the primary election.[6]

An election involving the Delegate to the House of Representatives from the District of Columbia is governed by the Federal Contested Elections Act, as is one involving the Resident Commissioner to the Congress [from Puerto Rico].[7]

### *Contestants as Candidates in General Election*

**§ 19.1 Where the contestant was not a candidate in the general election, but merely in the party primary, the election committee will recommend dismissal of the contest on the basis of the contestant's lack of standing.**

In the 1969 Georgia election contest of Lowe v Thompson (§ 63.1, infra), the election committee considered the notice of contest, brief of the contestant, oral argument, and precedents of the House, and recommended dismissal of the fourth contested election case brought by the contestant in 20 years, for lack of standing. The contestant, who did not allege any fraud or wrongdoing on the part of the contestee, was not a candidate in the general election, having lost his own party's primary.

2. See also Lowe v Davis (§ 54.1, infra), Lowe v Davis (§ 56.3, infra), and Lowe v Thompson (§§ 62.1, 63.1, infra), contests brought by the same individual.
3. 2 USC § 382 (a).
4. 2 USC § 381 (b).
5. See former 2 USC § 201.
6. See § 19.1, infra.
7. 2 USC § 25 (note); 2 USC § 381(a).

Similarly, in the 1967 contest between the same parties (§ 62.1, infra), the committee on elections had declared that there was no precedent for depriving a member of his seat solely on the basis of the irregularity of the nomination of his opponent in the general election, and concluded that Mr. Lowe, not being a candidate in the general election, had no standing to bring a contest under the contested election law.

**§ 19.2 The House has adopted a resolution providing that one who was not a candidate in an election for a seat in the House was not competent to contest the election.**

In the 1965 New York contested election case of Frankenberry v Ottinger (§ 61.1, infra), by a vote of 245 yeas to 102 nays, the House agreed to a resolution that dismissed the contest and held the contestant, who had not been a candidate in the election, not to be competent to bring a contested election contest under 2 USC §§ 201 et seq. During debate, proponents of the resolution cited the 1941 Ohio contested election of Miller v Kirwan (§ 51, infra), and *In re Voorhis*, 291 F 673 (S.D. N.Y. 1923) in support of their position. In the former, the House had similarly found a no candidate not to be competent to bring an election contest; and in the latter, the court had held that questions as to the application of the contested election statute are justiciable by the House and the House alone.

**§ 19.3 Contestants who have not been candidates at the election have no standing to invoke the contested election statute.**

In the 1965 Mississippi election contest of Wheadon et al. v Abernethy et al. [The Five Mississippi Cases] (§ 61.2, infra), the election committee report recommended dismissal of five election contests in which the contestants had not been candidates in the general election of November 1964 for Members of the U.S. House of Representatives.

The contestants alleged that large numbers of Negroes had been excluded from the electoral process through intimidation and violence, with the result that the free will of the voters had not been expressed. The desired relief was to have the House unseat the contestees and vacate the elections.

The contestants had been selected at an unofficial "election," which was held without any authority of law in the state.

The House followed its precedents in dismissing the contests because the contestants lacked standing under 2 USC §§ 201 et seq.

**§ 19.4 A person who was a candidate in the primary election, but not in the general election won by contestee, is not competent to institute a contest in the House.**

In Miller v Kirwan (§ 51.1, infra), a 1941 Ohio contest, the House dismissed a contest initiated by a person who had been a candidate for the Democratic nomination from the 19th Congressional District of Ohio in the primary election, but not in the ensuing general election, on the ground that the contestant was incompetent to initiate the contest.

**§ 19.5 A contestant who had been a candidate in the primary election but who had not been a candidate in the general election instituted a contest under the statute governing contested election cases.**

In the 1951 Georgia contested election case of Lowe v Davis (§ 56.3, infra), the contestant, who had been a candidate in the party primary, but not in the general election, challenged the contestee, who had prevailed in both the primary and the general election. The Committee on House Administration ultimately recommended dismissal of the contest for failure to take testimony within the time prescribed and the House agreed to a resolution dismissing the contest.

**§ 19.6 To entitle a person to bring a contest under the statute, he must have been a candidate for the seat in the House during the general election in question.**

See In re Plunkett (§ 53.2, infra), wherein the Chairman of the Committee on the Judiciary advised the Members of the House to ignore proceedings contesting the 1944 elections of 79 Members of the House from states having poll taxes.

## F. NOTICE OF CONTEST

### § 20. Generally; Time

Under the Federal Contested Elections Act, a defeated candidate has 30 days in which to initiate a contest; that is, the notice of contest must be filed within 30 days after the result of the election has been declared by the properly authorized officer or Board of Canvassers.[8]

#### *Necessity of Filing Notice of Contest*

**§ 20.1 An election dispute that is not instituted by notice of contest as required by law is subject to dismissal.**

In the 1934 disposition of the Michigan contested election of Bowles v Dingell (§ 47.1, infra), the summary report of the Committee on Elections related that "there was no notice of contest ever filed in said matter, as provided by law." The contest was dismissed. The report accompanied a resolution, which was adopted by the House by voice vote and without debate, providing that the contestant was not entitled to a seat and that the contestee was entitled to a seat in the House.

8. 2 USC § 382(a).

#### *Notice of Contest Filed Late*

**§ 20.2 The House may, by resolution, permit a contestant to initiate a contest within a certain period of time notwithstanding the expiration of the time permitted by law for the filing of such a contest.**

In Brewster v Utterback (§ 47.2, infra), a 1933 Maine contest, the House, by resolution, authorized the Speaker to administer the oath of office to the Member-elect from Maine, and permitted contestant Brewster to contest the seat under the contested elections law notwithstanding the expiration of the time fixed for bringing such contests, provided such contest would be filed within 60 days.

**§ 20.3 An elections committee may consider testimony taken pursuant to an amended notice of contest, though such notice was not filed until after the time permitted by law.**

In Lovette v Reece (§ 47.11, infra), a 1934 Tennessee contest, contestant filed timely notice of contest on Dec. 17, 1932, to which contestee filed timely answer and motion to dismiss on Jan. 15, 1933. Then, in April of 1933, con-

testant filed an amended and supplemental notice of contest. Although the notice was not filed until after the time prescribed by law for the filing of notice of contest, the committee granted contestant's request that testimony of certain witnesses, taken pursuant to such notice, be printed. The committee found that such evidence failed to support the charges.

**§ 20.4 A motion to dismiss an election contest may be brought on the grounds that contestant failed to file notice of contest within the 30-day period required by law.**

In McClandless v King (§ 48.2, infra), a 1936 Hawaii contest, contestee moved to dismiss the contest as not having been timely commenced, in that notice of contest was not filed within 30 days after the result of the election had been determined by the official authorized to do so. The Governor of the Territory of Hawaii issued a certificate of election on Nov. 10, 1934. Subsequently, on Nov. 27, 1934, the secretary of the territory canvassed the vote and issued certification thereof. Contestant's notice of contest was filed on Dec. 15, 1934. The general election laws of the Territory of Hawaii in effect at the time of the election provided that the secretary was to declare and certify all election results. Accordingly, the committee reported that the certificate issued by the Governor was without legal effect, and the proper certification was that issued by the secretary, and that the contestant had therefore filed his notice of contest within the 30-day period. Contestee's motion to dismiss was denied.

### *Commencement of Statutory 30-day Period*

**§ 20.5 The statutory requirement that the contestant file notice of contest within 30 days after the result of such election shall have been determined has been construed to run from the actual issuance of a certificate of election to the contestee, and not from the date of an official canvass of votes under state law.**

In the Maine election contest of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, the contestee claimed in his answer that the contestant's notice of contest, which notice had been filed on Jan. 2, 1957, was not timely as it was not "within 30 days after the result of such election shall have been determined . . ." as required by 2 USC

§ 201.[9] In deciding against the contestee's claim that the determination date should have been considered as Sept. 26, 1956, the date of the official canvass, the committee ruled that there was no determination under the federal statute until the actual issuance of the certificate to the contestee on Dec. 5, 1956.

## § 21. Service of Notice

Under the Federal Contested Elections Act, the notice of contest must be served on contestee in the manner specified. The notice may be served on contestee by delivery of a copy to him personally or to his authorized agent, by leaving a copy at his home or place of business, or by mailing a copy to him by registered or certified mail.[10]

Service by mail is complete on mailing, and the return receipt from the post office is proof thereof. Proof of service must be made to the Clerk promptly and within the time allowed for contestee's answer, but the failure to do so does not affect the validity of the service.[11]

9. Under the Contested Elections Act of 1969, this section is now 2 USC § 382(a).

10. 2 USC § 382(c), (1)–(5).

11. 2 USC § 382(c), (5), (6).

### *Substituted Service*

#### § 21.1 Subsequent valid service of notice of contest renders moot any question of the efficacy of prior attempted "substituted service."

In the 1957 Iowa election contest of Carter v LeCompte (§ 57.1, infra), the official result of the election was not determined until Dec. 10, 1956, but the contestant had earlier served the contestee by "substituted service." The election committee majority decided that the contestant's subsequent personal service on the contestee on Dec. 17, rendered "moot any question as to the sufficiency of the service contemplated by 2 USC § 201."[12]

In the 1957 Iowa election contest of Dolliver v Coad (§ 57.2, infra), the issue arose as to whether "substituted service," as provided under Rules 4(d)(1) and 56(a) of the Federal Rules of Civil Procedure, complied with the requirements of proper service under 2 USC § 201, but the election committee did not decide the issue. Under the present 2 USC 382(c), however, "substituted service" is permissible.

12. This is now 2 USC § 382(a).

## § 22. Form and Contents of Notice

Under the Federal Contested Elections Act, the notice of contest must state with particularity the grounds on which the contestant relies. The notice must also state that an answer to it must be served on contestant within 30 days after service of the notice.[13] The Act further requires that the notice of contest be signed and verified.[14]

The notice of contest should also claim right to the contestee's seat, as the contestee may, at his option, assert the failure to claim right to the seat as a defense under the provisions of 2 USC § 383(b)(4). Similarly, while the act does not specify what constitutes grounds that the contestant may assert to contest the election, the contestee may, at his option, raise as a defense the failure of the notice of contest to state grounds "sufficient to change result of election" under 2 USC § 383(b)(3). Therefore, the notice of contest should state with particularity the grounds upon which the contestant contests the election and such grounds should be sufficient to change the result of the election.

**13.** 2 USC § 382(b).

**14.** 2 USC § 382(b).

### *Failure to State Grounds With Particularity*

#### § 22.1 A contestee may request dismissal where the allegations in the notice are "vague and uncertain and lacking in the necessary particulars."

In Gormley v Goss (§ 47.9, infra), a 1934 Connecticut contest, contestant alleged that through "fraud, irregularities, corruption, and deceit" on the part of contestee's agents at a voting booth he was deprived of "many votes far in excess" of the number of votes necessary to overcome his opponent's majority. Contestee sought dismissal on the ground that such allegations were "vague and uncertain and lacking in the necessary particulars." The committee heard argument as to the sufficiency of notice, and while deciding the contest on other grounds, agreed that contestant's motion did not meet the statutory requirements.

#### § 22.2 A contestee may move to dismiss on the ground that the contestant has failed to state with particularity the grounds on which he relies in his notice of contest.

In Chandler v Burnham (§ 47.4, infra), a 1934 California contest, contestant served notice alleging

that "he had received a majority of all the lawful votes cast"; that election officials had rejected as void certain ballots that had been cast for him; that there were deviations in the number of ballots delivered to and the number accounted for in certain precincts; that many ballots were unaccountably missing from the ballot boxes; and "that by reason of frauds, irregularities, and substantial errors, many votes counted for the contestee should have been counted for the contestant." The committee, while not dismissing the contest for failure of contestant to state his case with particularity, declared that contestant's notice of contest had been insufficient in this respect and would under other circumstances afford grounds for sustaining contestee's motion to dismiss.

**§ 22.3 Where contestant's notice does not specify with particularity the grounds upon which he relies in the contest, and no testimony is taken within the prescribed time, the House may sustain the contestee's dismissal motion based on those grounds.**

In Roberts v Douglas (§ 54.4, infra), a 1947 California contest, contestant's notice recited only:

> Contest of your right to hold said seat is entered upon the grounds of failure to meet residence requirements under both the Constitution of the United States and the State of California.
>
> Additional grounds for contest of your right to hold said congressional seat is to be found in many fraudulent practices alleged in the election of November 5, 1946, which justify congressional investigation.

There was no testimony taken within the prescribed period. The Speaker referred the Clerk's letter, together with a letter from the contestee's attorney and contestee's motion to dismiss to the Committee on House Administration, and ordered all the papers printed as a House document. The committee, through a resolution offered by Mr. Ralph A. Gamble, of New York, then recommended dismissal of the contest, with which resolution the House agreed.[15]

### *Necessity of Signature*

**§ 22.4 A notice of contest is not sufficient if it does not bear the original signature of the contestant.**

In the 1957 Iowa election case of Dolliver v Coad (§ 57.2, infra), the House agreed to a resolution without debate providing that it

**15.** See also Michael v Smith, § 54.3, infra.

would not recognize an unsigned paper as valid notice of contest and that the contestant's unsigned notice of contest was not in the form required by the applicable statute (2 USC § 201).[16]

## G. PLEADING

### § 23. Generally

The pleadings in an election contest include the response of contestee to contestant's notice. This response must be made within 30 days after the service of the notice.[17]

Certain defenses, at the option of contestee, may be raised by motion prior to answer. They are: (1) insufficiency of service of notice of contest, (2) lack of standing of contestant, (3) failure of the notice to state grounds sufficient to change the result of the election, and (4) failure of contestant to claim a right to contestee's seat.[18]

A motion for more definite statement is permitted under the Federal Contested Elections Act.[19]

If a motion to dismiss is entered and denied, or if its disposition is postponed until a hearing on the merits, the answer is to be served within 10 days after notice of such action. If a motion for more definite statement is granted, the answer is to be served within 10 days after service of the more definite statement.[20]

Except for the notice of contest, every paper required to be served is to be served on the attorney representing the party, or, if he is not so represented, on the party himself, in the manner specified by the controlling statute.[1]

Proof of service, while not affecting the validity of such service, is a necessary procedural step under the Federal Contested Elections Act. Papers filed subsequent to the notice of contest are to be accompanied by proof of service by affidavit showing the time and manner thereof.[2]

A motion to suppress a deposition may be sought on the ground that the reasons given for a re-

**16.** The requirement as to contestant's signature is presently embodied in 2 USC § 382(b).

**17.** 2 USC § 383.

Notice of contest, see §§ 20, et seq., supra.

**18.** 2 USC § 383(b).

**19.** 2 USC § 383(c).

**20.** 2 USC § 383(d).

**1.** 2 USC § 384.

**2.** 2 USC § 384(c).

fusal to sign it require rejection of it in whole or in part.[3]

A motion to quash or modify a subpena compelling the production of documents, or to deny it conditionally, is permitted under the Federal Contested Elections Act. It provides that the Committee on House Administration, on motion timely made, may (1) quash or modify the subpena if it is unreasonable or oppressive, or (2) deny it conditionally on the advancement by the subpena proponent of the reasonable cost of producing the material sought.[4]

The manner in which the pleadings and other papers in a case are to be filed with the Clerk is prescribed by the Federal Contested Elections Act.[5]

### *Motion for Directed Verdict*

**§ 23.1 Where testimony had not been collected by the Clerk, printed, and laid before the House, and the contested election had not yet been referred to the Committee on House Administration, contestant's motion for a "directed verdict" was premature.**

In the 1957 Iowa contested election of Carter v LeCompte (§ 57.1, infra), the Clerk's letter transmitting the testimony and required papers was not referred by the Speaker to the Committee on Elections and laid before the House until Aug. 26, 1957, four days before adjournment of the first session of the 85th Congress. On that date the contest was formally presented to the House. Earlier, however, the contestant had filed a motion for a "directed verdict" with the Committee on House Administration, which ruled that it was premature, as a contrary ruling would have been in violation of the rules of the House [then clause 9(k) of Rule XI] requiring contested elections to be referred to the Committee on House Administration, and also in violation of the old federal statute [then 2 USC § 201 et seq.] requiring that testimony be collected by the Clerk, printed and laid before the House for reference.

### *Motion for Default Judgment*

**§ 23.2 The House has refused to take action on a contestant's motion to enter a default against the contestee for his failure to answer the notice of contest within the time prescribed by law.**

3. 2 USC § 386(h).
4. 2 USC § 388(e).
5. 2 USC § 393.

In Woodward v O'Brien (§ 54.6, infra), a 1947 Illinois contest, contestant submitted a letter stating that contestee had not answered the notice of contest within the required period, and that a default should be entered against contestee by the House. This letter was referred to the appropriate committee, but the committee took no action on it and indeed recommended that the notice be dismissed for failure to take testimony within the required period.

## § 24. Answer

The Federal Contested Elections Act provides that when a notice of contest is served in the manner prescribed, contestee must respond with a written answer, and that such answer must be served on contestant within 30 days. The answer must admit or deny the averments relied on by contestant. If contestee is without knowledge or information sufficient to form a belief as to the truth of an averment, he must so state, such statement having the effect of a denial. This answer must set forth affirmatively any other defenses, in law or fact, relied on by contestee.[6]

Contestee must sign and verify his answer by oath or affirmation.[7] Under the controlling statute, the failure of contestee to answer the notice of contest is not to be deemed an admission of the truth of the averments in the notice.[8]

### *Failure to Make Timely Answer*

**§ 24.1 Contestee's failure to file an answer within the requisite 30 days did not prevent him from ultimately prevailing and having the contest dismissed.**

In Mankin v Davis (§ 54.2, infra), a 1947 Georgia contest, a contestant who had not been a candidate in the general election, but only during the primary, timely filed an election contest notice and brief. The contest was dismissed, the contestee's reply having been given due consideration even though not filed within the requisite time period.

### *Answer Filed for Information Only*

**§ 24.2 Contestee's answer, filed with the Clerk for information only, can be included in**

6. 2 USC § 383.

7. 2 USC § 383.

8. 2 USC § 385.

**the Clerk's communication to the Speaker relating that no testimony has been filed in the contest.**

In Browner v Cunningham, a 1949 Iowa contested election case (§ 55.1, infra), the contestee's answer was transmitted by the Clerk to the Speaker along with the Clerk's letter relating that no testimony had been received and stating the opinion of the Clerk that the contest had abated.

## § 25. Motion to Dismiss

Today, a failure of the contestant to allege grounds for an election contest is raised by motion to dismiss.[9] Under the new statute, the burden of proof is upon contestant in the first instance to present sufficient evidence, even prior to the formal submission of testimony under the statute, to overcome the motion to dismiss,[10] since exhaustive hearings and investigations should be avoided where contestant cannot make a prima facie case.

### *Failure to Properly Forward Evidence*

**§ 25.1 A motion to dismiss will lie where the contestant has not adduced evidence or forwarded testimony to the Clerk's office in the manner prescribed by law.**

In the 1945 Michigan election contest of Hicks v Dondero (§ 53.1, infra), the Clerk transmitted a letter to the Speaker relating that his office had received packets of material which had not been addressed to the Clerk or adduced in the "manner contemplated by the provisions of the statutes." The election committee's report stated that the contestant had not taken any testimony in support of his notice of contest within the time prescribed by law. Contestee having entered a motion to dismiss, the House adopted a resolution dismissing the contest and declaring the contestee to be entitled to his seat.

### *Failure to Produce Evidence*

**§ 25.2 An elections committee may dismiss an election contest for failure of the contestant to transmit evidence taken by him in the matter to the Clerk, as required by law.**

In Shanahan v Beck (§ 47.15, infra), a 1934 Pennsylvania con-

9. 2 USC § 383(b)(3).

10. See Tunno v Veysey, discussed in §§ 35.7, 64.1, infra.

test, the committee dismissed the contest for failure to transmit evidence to the Clerk, noting that there was no evidence before the committee of the matters charged in the notice of contest, and no briefs filed, as provided by law.

**§ 25.3 Where the Clerk of the House receives contestee's motion to dismiss a contest, no evidence having been submitted by either party within the time permitted by law, the Clerk communicates that fact to the Speaker together with the motion to dismiss. This motion may be ordered printed by the Speaker and referred to the Committee on Elections.**

In the 1940 Tennessee election contest of Neal v Kefauver (§ 50.1, infra), the Speaker laid before the House on Mar. 1, 1940, a communication from the Clerk relating that no testimony on behalf of either party had been submitted within the time permitted by law. Accompanying the Clerk's letter was a motion by the contestee to dismiss the contest. The Clerk's communication and motion by the contestee were referred by the Speaker to an elections committee and ordered printed. The House later agreed to a resolution dismissing the contest and declaring the contestee to be entitled to the seat.

**§ 25.4 A contestee may move to dismiss a contest for failure of the contestant to take testimony after the expiration of the contestant's time for taking testimony, and may renew the motion after the expiration of all time permitted by law.**

In the 1951 Missouri contested election case of Karst v Curtis (§ 56.2, infra), the contestee moved to dismiss for failure of the contestant to take testimony within 40 days after service of the contestee's answer; and he renewed that motion after expiration of the 90-day statutory period. This, along with the contestant's letter informing the committee of his desire to discontinue further action after a recount failed to disclose any alleged discrepancies in the voting was cited in the committee report recommending the adoption of a resolution, which the House agreed to, that the contest be dismissed.

**§ 25.5 Where the contestant fails to take testimony within the statutory time limits for taking such testimony in a contested election, an elections committee may dismiss the contest upon motion by the contestee.**

In the 1963 Minnesota contested election case of Odegard v Olson (§ 60, infra), the contestee moved to dismiss, claiming that the 40-day period for gathering evidence by contestant had expired and that no evidence had been obtained and forwarded to the Clerk as provided under 2 USC: §§ 203, 223, and that therefore no contest existed. The elections committee found that the contestant "had abandoned the statutory procedure which established a specific time within which to develop evidence. . . ." By majority vote, the committee concluded that the contestee's contention should be sustained on the grounds that the contestant "failed to comply with the statutes in that he did not take testimony as provided by law and that the time limit for taking such testimony has now expired."

***Motion to Dismiss as Premature***

**§ 25.6 Contestee's motion to dismiss will be denied as premature although made at a time when there is no evidence actually before the election committee, where it appears that testimony adduced under the election contest statute has not yet been printed or transmitted by the Clerk to the committee.**

In the 1959 Kansas contested election case of Mahoney v Smith (§ 58.2, infra), the Committee on House Administration concurred in the election subcommittee's denial of contestee's motion to dismiss the contest "for the reason that it was impossible at that early date to evaluate the merits of the case or rule on the testimony." There was no evidence before the committee because the testimony adduced under the contest statute had not yet been printed or transmitted by the Clerk to the committee.

## § 26. Motion for More Definite Statement

A motion for more definite statement is permitted under the Federal Contested Elections Act. It provides that if a notice of contest to which an answer is required is so vague or ambiguous that the contestee cannot reasonably be required to frame a responsive answer, he may move for a more definite statement before interposing his answer. The motion must point out the defects complained of and the details desired. If the motion, which is heard by the Committee on House

Administration, is granted, and the order of the committee is not obeyed by contestant within the time required, the committee may dismiss the action or make such other order as it deems just.[11]

## H. TAKING OF TESTIMONY; DEPOSITIONS

### § 27. Generally; Time

Under the Federal Contested Elections Act, either party may take the testimony by deposition of any person, including the opposing party, either for discovery purposes or for use as evidence in the case or for both purposes.[12]

Contestant may take testimony within 30 days after service of the answer, or, if no answer is served, within 30 days after the time for answer has expired. Contestee may take testimony within 30 days after contestant's time for taking testimony has expired. Ten days is permitted for the taking of rebuttal testimony.[13]

The testimony must be taken before an officer authorized by law to administer oaths.[14]

A party desiring to take a deposition must serve written notice on the opposing party not later than two days before the examination, unless the parties stipulate in writing to the contrary.[15]

Where a witness who has been subpenaed under the Federal Contested Elections Act willfully makes default, or refuses to answer a pertinent question, he is subject to both fine and imprisonment.[16]

Except for the time for serving and filing a notice of contest, the Committee on House Administration, for good cause shown, may at any time in its discretion order a period enlarged if request therefor is made before the expiration of the period originally prescribed or ordered; or, on motion made after the expiration of the specified period, it may permit the act to be done where the failure to act was the result of excusable neglect.[17]

**11.** 2 USC § 383(c).

**12.** 2 USC § 386(a).

**13.** 2 USC § 368(c).

**14.** 2 USC § 386(d).

As for pay of witnesses subpenaed to appear before the House or any of its committees, see Rule XXXV, *House Rules and Manual* § 931 (1973).

**15.** 2 USC § 387 (a), (b).

**16.** 2 USC § 390, authorizing a fine of not more than $1,000 or imprisonment of not more than 12 months, or both.

**17.** 17. 2 USC § 394(c).

### *Dismissal for Failure to Take Testimony Within Statutory Period*

**§ 27.1 Failure to take testimony within the time required by law and committee rules governing contested elections results in dismissal by the House of contestant's notice of intention to contest an election.**

In 1949, in the Iowa contested election of Browner v Cunningham (§ 55.1, infra), the House agreed without debate to dismiss the contest after more than 90 days had elapsed from the filing of notice and no testimony "of any character, kind, or nature," according to the committee report, had been received by the Clerk in support of the allegations set forth in the notice of intention to contest the election.[18]

**§ 27.2 If the testimony is not taken within the time and in the manner required by statute, a motion to dismiss will lie.**

In Hicks v Dondero (§ 53.1, infra), a 1945 Michigan contest, the contestant submitted copies of transcripts of testimony taken before a local Michigan canvassing board prior to the initiation of the contest. This material was not received by the Clerk within the time prescribed by law, and had not been properly addressed or transmitted. Contestee's motion to dismiss the contest, and contestant's affidavit in opposition to that motion, were filed. A resolution dismissing the contest was agreed to by voice vote and without debate.

**§ 27.3 Contestant, a candidate for the party nomination in the primary but not in the general election, failed to take testimony within the time prescribed by law.**

In the 1951 Georgia contested election case of Lowe v Davis (§ 56.3, infr ), the Committee on House Administration unanimously recommended the adoption of a resolution, to which the House subsequently agreed, that the contest should be dismissed. The report states that the contestant did not comply with the procedural statutory time requirements for conducting a contest, specifically the taking of testimony pursuant to 2 USC § 203.[19]

**§ 27.4 Where no testimony has been taken within the time**

18. See also Fuller v Davies (§ 55.2, infra), and Thierry v Feighan (§ 55.4, infra), contests from New York and Ohio, respectively, which were settled by the same resolution for the same reason.

19. Now 2 USC § 386.

**prescribed by law and contestee alleges that the notice of contest does not specify with particularity the grounds upon which the contestant relies, the House has agreed to dismissal of a contest without debate.**

In Roberts v Douglas (§ 54.4, infra), a 1947 California contest, the Clerk transmitted the notice of contest to the Speaker. (The contest appeared to have abated as neither party had taken testimony within the time prescribed.) The Speaker referred the letter, the notice of contest, a motion for dismissal from the contestee and a letter from her attorney in support thereof, to the Committee on House Administration. Subsequently the House dismissed the contest on a voice vote and without debate.

**§ 27.5 A motion to dismiss is available to contestee where the contestant has failed to take testimony within the time prescribed by law, even though contestee's answer to the notice was not filed within the required period.**

In Woodward v O'Brien (§ 54.6, infra), a 1947 Illinois contest, the House dismissed the contest after contestee had moved to dismiss on the grounds that no testimony had been taken by contestant, during the prescribed period, though such motion recited that contestee had not filed his answer within the time required by statute.

### *Failure to Forward Testimony to Clerk*

**§ 27.6 A failure to forward testimony to the Clerk within the 30-day period was raised in a letter to the House as a bar to prevent contestant from continuing with the contest, but this request was not considered by the elections committee.**

In Clark v Nichols (§ 52.1, infra), a 1943 Oklahoma contest, the contestee requested the House to prevent contestant from proceeding with the contest because of his failure to comply with the 30-day period, as required by law (former 2 USC § 231); the committee did not consider the request that contestant be barred from continuing the contest, but nevertheless recommended that the contest be dismissed on other grounds.

### *Extensions of Time for Taking Testimony*

**§ 27.7 Where testimony is taken pursuant to a con-**

**tested elections statute, and the contestee is charged with a wide variety of statutory violations, an elections committee may conclude that it cannot properly decide the contest without the taking of further testimony.**

In Lanzetta v Marcantonio (§ 48.1, infra), a 1936 New York contest, contestee was charged with violations of "nearly all of the elections laws including intimidation of voters, violation of the Corrupt Practices Act, illegal and excessive expenditure of money, failure to account for various contributions, and inciting and leading riots." The committee concluded that it could not properly decide the contest without causing further testimony to be taken, and that further testimony could not be taken due to the approach of adjournment *sine die* of the 74th Congress.

**§ 27.8 The statutory period during which a contestant is permitted to take testimony is tolled during the time that ballots sought to be subpenaed by his appointed official are in the custody of a court and unavailable.**

In Kunz v Granata (§ 46.2, infra), a 1932 Illinois contest, the question arose as to whether the statutory period allowed for the taking of testimony had expired. The contestant had applied for an appointment of a notary public to obtain testimony on his behalf, and he in turn had served a subpena upon the election officials requiring them to produce ballots and certain other materials pertaining to the election. These actions proved ineffective, however, because contestee's counsel had obtained a court order impounding the ballots cast in the election. Under these circumstances, the elections committee majority concluded that the ballots were "in custodia legis" and that the time during which the ballots were so held should not be considered in determining the statutory period in which the contestant was allowed to take testimony.

**§ 27.9 An elections committee may give consideration to testimony laid before it by the Clerk pursuant to the election contest law, though not taken within the time required by the statute, where the committee finds justification for the delay.**

In Lanzetta v Marcantonio (§ 48.1, infra), a 1936 New York contest, more than 4,000 pages of testimony and exhibits were taken, but the testimony of con-

testant was not taken until after the expiration of the 90-day period prescribed by former section 203, title 2 of the United States Code. The Clerk did not order printed that portion of the testimony taken after the expiration of the required time, but the elections committee, having found some justification for the delay, considered all testimony that was made available to it by the Clerk.

**§ 27.10 An extension of time for taking testimony, may be in the form of a resolution granting a total of 65 days, with the contestant to take testimony during the first 30 days, the contestee to take testimony during the succeeding 30 days, and the contestant to take testimony in rebuttal during the remaining five days.**

See the 1943 Illinois election contest of Moreland v Schuetz (§ 52.3, infra), where the House agreed to a resolution extending the time allowed for taking testimony to 65 days, based on a showing of "good cause" by the contestant.

***Extensions of Time for Good Cause***

**§ 27.11 An extension of time for the taking of testimony for an election contest will be granted only upon a showing of good cause.**

In Moreland v Schuetz (§ 52.3, infra), a 1943 Illinois contest, good cause for an extension of time was shown where contestant alleged certain irregularities in the counting of write-in votes and "split-ticket" ballots, but was unable to establish such allegations within the time required by law, because the election officials involved were unavailable.

**§ 27.12 Extensions of time for taking testimony were based on the fact that time was needed to prepare an application for a recount.**

In Sullivan v Miller (§ 52.5, infra), a 1943 Missouri contest, contestant, based on time consumed by both parties in preparing a joint application for recount, asked for 40 additional days in which to prepare testimony and for 40 days thereafter for contestee to take testimony. The House adopted a resolution based on a committee's recommendation that each party be given a 30-day extension of time for taking testimony, with an additional five days for contestant to compile rebuttal testimony.

**§ 27.13 The sufficiency of reasons shown for granting ad-**

**ditional time to take testimony may be referred to an elections committee.**

In the 1957 Iowa election contest of Carter v LeCompte (§ 57.1, infra), the contestant petitioned the House for an additional 20 days to take testimony. The request was ultimately referred to the Subcommittee on Elections which considered the House precedents on the requested extension before unanimously determining that the contestant had shown insufficient reasons for the extension. The Committee on House Administration unanimously adopted the subcommittee opinion. No formal report on the issue was made to the House.

### *Subsequent Authorization for Informal Extension*

**§ 27.14 The Committee on House Administration has informally granted extensions of time to parties in a contest for taking testimony without the House having adopted a resolution to that effect, and has subsequently authorized such extensions in its final report.**

In Wilson v Granger (§ 54.5, infra), a 1948 Utah contest, the delay of over a year by the parties in filing the required papers with the Clerk as provided by statute is explained merely by the statement in the report that "the extensions of time heretofore granted in this contest by the Committee on House Administration are hereby authorized and approved."

### *Stipulation of Parties for Extension of Time*

**§ 27.15 The parties to a contest may agree to a stipulation ret questing an extension of time for the contestant to compensate for an adjournment taken at the contestee's request.**

In the New York contested election case of Macy v Greenwood (§ 56.4, infra), arising out of the 1950 election, the contestant, at the contestee's request, adjourned the calling of two witnesses for six days during the 40-day period allotted for the taking of testimony under 2 USC §§ 201 et seq. Both parties had thus agreed to a compensatory extension of six days, subject to approval by the House. The House agreed by resoltion tn the extension.

## § 28. Examination of Parties and Witnesses

The officer before whom the testimony is taken puts the witness

under oath and records his testimony stenographically.[20] The opposing party has the right of cross examination;[21] if he does not wish to participate, he may transmit written interrogatories to the officer, who then propounds them to the witness and records the answers verbatim.[1]

After the testimony has been fully transcribed, the deposition is to be submitted to the witness for examination and reading, unless waived. Changes which the witness desires to make are to be entered on the deposition. The witness' refusal to sign a deposition may, in a proper case, be used against him unless, on a motion to suppress, the Committee on House Administration rules that the reasons given for such refusal require rejection of the deposition in whole or in part.[2]

Upon completion of a deposition, the officer before whom it is taken certifies thereon that the witness was duly sworn and that it is a true record of the testimony given. He then seals it, together with any accompanying papers, and files it with the Clerk of the House.[3]

The officer must then promptly notify the parties of the filing of the deposition with the Clerk. And he must furnish a copy of the deposition to any party or the deponent on payment of reasonable charges therefore.[4]

### *Unsigned Transcript of Deposition by Witness*

**§ 28.1 There have been instances in which attorneys have refused to accept an unsigned transcript of a witness' deposition, notwithstanding their prior agreement to waive such signatures.**

In Lanzetta v Marcantonio (§ 48.1, infra), a 1936 New York election contest, the Committee on Elections called the attention of the House to the actions of the contestee's attorneys in refusing to accept unsigned testimony as agreed, which necessitated further subpenas to witnesses, some of whom refused to respond or could not be found. Notwithstanding these actions, the House agreed to a resolution that contestee was entitled to the disputed seat.[5]

**20.** 2 USC § 386(g).

**21.** 2 USC § 386(b).

**1.** 2 USC § 386(g).

**2.** 2 USC § 386(h). This section of the statute permits waiver of the signature requirement.

**3.** 2 USC § 391.

**4.** 2 USC § 391 (b), (c).

**5.** For the procedure under the present statute, see 2 USC § 386(h).

## § 29. Scope of Examination; Objections

Witnesses may be examined regarding any matter, not privileged, relevant to the subject matter involved in the case, whether it relates to a claim or defense. The examination may extend to such subjects as the existence, description, nature, custody, and the condition and location of books, papers, documents, or other tangible things, as well as the identity and location of persons having knowledge of relevant facts. The right of cross examination is to be afforded the opposing party.[6]

Objections to the proceedings, including objections to the qualifications of the officer taking the deposition or to the manner of taking it, or to the evidence presented, or the conduct of any party, are to be noted by the officer. Evidence objected to is taken subject to such objection.[7]

A subpena to compel the production of books, papers, or other tangible things designated therein is permitted under the Federal Contested Elections Act. However, the Committee on House Administration, on motion, may quash or modify the subpena if it is unreasonable or oppressive, or condition denial of it on the advancement of reasonable production costs.[8]

### *Failure to Produce Testimony*

**§ 29.1 A request was made by contestant to the Clerk of the House seeking the production of testimony taken before a commissioner who failed to forward it to the Clerk.**

In Casey v Turpin (§ 47.3, infra), a 1934 Pennsylvania contest, the committee recommended dismissal of the contest for lack of evidence of the matters charged in the notice, and for the failure of the contestant to appear in person and show cause why his contest should not be dismissed. The contestant had argued that he could not present evidence because an official failed to forward testimony, and that he had asked the clerk to seek such testimony.

### *Ballots as "Papers" Required To Be Produced*

**§ 29.2 The statute authorizing an officer to require the production of "papers" has been construed to confer authority to require the production of ballots.**

6. 2 USC § 386(b).
7. 2 USC § 386(g).
8. 2 USC 388(e).

In the 1932 Illinois election contest of Kunz v Granata (§ 46.2, infra),[9] ballots were determined to be "papers" within the meaning of 2 USC § 219 such that their production could be demanded by a party.[10]

In this instance the contestant sought and obtained the appointment of a notary public to obtain testimony in his behalf. This notary public served a subpena duces tecum on the election officials, who then procured the ballots and other materials from a court which had impounded them (for recounting a municipal election).

Upon a recount conducted by the election officials under the supervision of the contestant's notary public, and in the presence of a notary public appointed by the contestee, it was determined that the contestant had received a majority of 1,288 votes in the election.

**§ 29.3 The more recent view, as asserted by the majority of an elections committee in 1949 and supported by the House, is that ballots themselves are not considered "papers" within the meaning of the contested elections statute permitting certain officers to require the production of papers pertaining to an election.**

In the 1949 Michigan contested election case of Stevens v Blackney (§ 55.3, infra), the Subcommittee on Elections sustained the action of an election official who refused to comply with a subpena duces tecum issued by a notary public ordering him to bring the ballots in a contested election. Although the minority contended that the notary public was an "official" within the purview of 2 USC § 206, who could demand production of the ballots as "papers" within the meaning of 2 USC § 219, and cited the contested election case of Kunz v Granata (§ 46, infra), in support thereof, the majority disagreed with this interpretation of § 219 and ruled that the official did not have to produce the ballots. The decision was based upon certain practical considerations, such as the difficulty of submitting certified copies of such "official papers" to the Clerk, payment to officials for making such copies and inclusion of voting machines as "official papers." Further, the majority cited the problem of decid-

**9.** Also reported in 6 Cannon's Precedents § 186.

**10.** 2 USC § 219, now 2 USC § 388. But see the 1949 Michigan contested election case of Stevens v Blackney (§ 55.3 infra).

ing which count would be accepted by the House, that of the contestant's notary public or that of the bipartisan officials who first conducted the count. It was suggested that the alternative of having the House conduct a third count would not be effective because the inviolability of the ballots would then have been destroyed. Ultimately, the House sustained the committee by agreeing to a resolution seating the contestee.[11]

## § 30. Subpenas

The attendance of witnesses may be compelled by subpena in the manner provided by the Federal Contested Elections Act.[12] Subpenas for compelling attendance at a deposition must be issued by a judge or clerk of a federal district court or court of record of the state or county where the place of examination is located.[13]

The time, method, and proof of service is prescribed under the act, as is the form of the subpena.[14]

A witness may be required to attend an examination only in certain counties or within 40 miles of the place of service.[15]

### *Clerk's Refusal to Respond to Subpena*

**§ 30.1 The settled rule that the Clerk will not give up House documents without authorization from the House has been followed by the Clerk in refusing to respond to a subpena served by contestant in an election contest for purposes of obtaining documents filed by contestee in a contested election case.**

In the 1934 Illinois election case of Weber v Simpson (§ 47.16, infra), the contestant's notary public served a subpena duces tecum upon the Clerk requesting

**11.** Under the 1969 Contested Elections Act, the question whether the ballots are "papers" that must be produced is not resolved. While only judges, or their clerks whether federal, state or county, may now issue subpenas under 2 USC § 388(a), they may command the person to whom it is directed to bring "books, papers, documents, or other tangible things" designated in the subpena under § 388(e). Ballots are not specifically mentioned. However, the subsection further provides that the committee before the time specified in the subpena may "quash or modify the subpena if it is unreasonable or oppressive. . . ." (See also § 39.3, infra.)

**12.** 2 USC § 386(e).

**13.** 2 USC § 388(a).

**14.** 2 USC § 388 (b), (d).

**15.** 2 USC § 388(c).

production of documents filed by the contestee in compliance with the Corrupt Practices Act. The Clerk transmitted the subpena, along with his reply refusing to comply with it, to the Speaker, who referred it to the Committee on the Judiciary. The 73d Congress did not authorize the Clerk to respond to the subpena.[16]

### *Noncompliance With Subpena*

**§ 30.2 Although the election contest statute authorized the use of subpenas, there were instances of refusals to testify as well as ignoring of subpenas by witnesses; for this reason, a House elections committee recommended that the laws be amended and some practical procedure be adopted by which witnesses could be required to obey process and give testimony.**

See Lanzetta v Marcantonio (§ 48.1, infra), a 1936 New York contest, wherein various witnesses refused to testify or could not be found or failed to obey the subpena or refused to sign testimony which might have been incriminating; it also appeared that contestee's law partner, the campaign fund treasurer, refused to testify. The law now provides for fine or imprisonment for noncompliance.[17]

## § 31. Affidavits

Under the Federal Contested Elections Act, the testimony of a witness may be presented in the form of an affidavit. The act provides that by written stipulation of the parties, the testimony of any witness may be filed in the form of an affidavit; or the parties may agree as to what a particular witness would testify to if his deposition were taken. Such affidavits or stipulations are to be filed within the time prescribed by the act.[18]

**16.** See 3 Hinds' Precedents § 2663.

**17.** Under the present statute, 2 USC § 390, noncompliance is a misdemeanor punishable by a fine of not more than $1,000 nor less than $100, or imprisonment for not less than one month nor more than 12 months.

**18.** 2 USC § 387(c).

## I. COMMITTEE HEARING AND REVIEW; DISMISSAL AND WITHDRAWAL

### § 32. Generally; Preparation of Briefs

The controlling statute provides that contested election cases are to be heard by the Committee on House Administration on the record of the case. This record consists of the papers, depositions, and exhibits filed with the Clerk.[19]

The contestant prepares a brief with an appendix disclosing those portions of the record sought to be considered. A similar brief is prepared by contestee.[20]

#### *Withdrawal of Evidence*

**§ 32.1 A contestant may be permitted to withdraw (without prejudice) unprinted evidence which he has submitted while testifying before a committee.**

In the 1934 Pennsylvania election contest of Shanahan v Beck (§ 47.15, infra), the contestant presented no documentary evidence to the election committee of the matters charged in his notice of contest and filed no brief in the matter. While the committee found that this constituted "laches" and was inexcusable under the circumstances, the contestant was nevertheless permitted to withdraw unprinted evidence which he had submitted while testifying before the committee, without prejudice.

### § 33. Dismissal and Withdrawal of Contest

#### *Cause for Dismissal*

**§ 33.1 An elections committee may dismiss a contest for failure of a party to present evidence of matters charged in a notice of contest, or failure to file briefs as provided by law, or failure of a contestant to appear and show cause why his contest should not be dismissed.[21]**

#### *Order to Appear*

**§ 33.2 A contestant may be ordered to appear before a committee and show cause why his contest should not be dismissed for failure to submit evidence.**

**19.** 2 USC § 392(a).

**20.** 2 USC § 392.

**21.** See Casey v Turpin (§ 47.3, infra), a 1934 Pennsylvania contest.

In the 1934 Pennsylvania election contest of Casey v Turpin (§ 47.3, infra), the elections committee dismissed the case, stating in its report that the contestant had failed to present evidence to the committee of the matters charged in his notice of contest, or to file briefs, or to appear in person to show cause why his contest should not be dismissed.[1]

### *Withdrawal of Contest*

**§ 33.3 Where a recount failed to disclose evidence of an alleged discrepancy, a contestant withdrew his contest.**

In the 1951 Missouri contested election of Karst v Curtis (§ 56.2, infra), the contestant requested withdrawal of his contest after a recount failed to disclose the irregularities suggested by his party's county committee, based on charges of improper tallying of ballots in a local election. The contestant's communication was referred by the Speaker to the Committee on House Administration and printed as a House document. The contest was then dismissed by House resolution.

### *Manner of Withdrawal*

**§ 33.4 Where a defeated candidate wishes to withdraw from a contest he has initiated, he does so by way of a written request for dismissal, which he should file with the Clerk of the House. Such dismissal is then brought to the attention of the House by a letter from the Clerk to the Speaker.**

In Williams v Mass (§ 49.3, infra), a 1937 Minnesota contest, a defeated candidate who had initiated an election contest communicated to the Clerk his statement of withdrawal within the time permitted by law for the taking of testimony.

**§ 33.5 Contestant's notice of withdrawal of contest may be submitted in the form of a letter to the Clerk at any time during the time required by law for the taking of testimony.**

In the 1939 Ohio election contest of Smith v Polk (§ 50.3, infra), the Clerk transmitted a letter to

1. In an earlier communication with the Clerk, the contestant had alleged that the commissioner before whom testimony had been taken in his behalf had failed to forward this testimony. The contestant had accordingly requested the House to require production of such testimony. Although the request was referred to the Committee on Elections and ordered printed as a House document, it is unclear whether action was ever taken on the request.

the Speaker informing him that the Clerk had received a letter from the contestant withdrawing the contest. The contestant's letter asked that the contest be dismissed by the House. The Speaker laid the communication before the House and then referred it to the Committee on Elections No. 3 and ordered it printed as a House document.

**§ 33.6 Where, during the time required by law for the taking of testimony, the contestant notifies the Clerk of his withdrawal of the contest and of his request that it be dismissed, the Clerk communicates such request to the House for reference to an elections committee by the Speaker.**

In Smith v Polk (§ 50.3, infra), a 1939 Ohio contest, contestant notified the Clerk of the House by letter of his withdrawal of the contest which he had instituted under the Federal Contested Elections Statutes against the seated Member (James G. Polk). This letter asked that the contest be dismissed by the House. Contestant's decision to withdraw and dismiss his notice of contest was based on his belief as to the expense of obtaining evidence and what he perceived as a difficulty in obtaining a favorable determination from an elections committee, the majority of which represented members from another political party.[2]

## J. EVIDENCE

### § 34. Generally

The ordinary rules of evidence govern in election contests as in other cases; thus, the evidence must be relevant and confined to the point in issue.[3]

Evidence taken ex parte and not in conformity with the election contests statutes will not be considered.[4] Evidence gathered by a

2. In debate on a resolution dismissing the 1965 Iowa election contest of Peterson v Gross (§ 61.3, infra), Neal E. Smith (Iowa), stated that election contest procedures cost from $10,000 to $30,000 at a time when "few, if any, Democratic candidates for Congress in Iowa ever had $10,000 available to spend in a general election campaign, let alone a contest. . . ." 111 CONG. REC. 26502, 89th Cong. 1st Sess., Oct. 11, 1965.

3. Cannon's Precedents § 77.

4. § 34.3, infra.

special committee investigating campaign expenditures, however, has been submitted to the Committee on House Administration in anticipation of the filing of an election contest.[5]

### *Collecting Evidence for Future Use*

**§ 34.1 The findings of a special committee to investigate campaign expenditures for the House, a committee established by the preceding Congress, were given to the Committee on House Administration in the event that a contest would be filed, to be used by the parties to the contest to support their case.**

In the New York contested election of Macy v Greenwood (§ 56.4, infra), arising from the 1950 elections, the Committee on House Administration accepted the findings of the Special Committee to Investigate Campaign Expenditures. This committee had been specially created by the preceding Congress, the 81st, and directed to report to the House by Jan. 3, 1951. The special committee reported that the votes in this election had been fairly tabulated.

The House subsequently agreed to a resolution that the contestee was duly elected and entitled to his seat.

### *Necessity of Producing Evidence*

**§ 34.2 The Subcommittee on Elections informed a contestant, after the filing of notice but before referral, that the House would not order a recount without evidence and before testimony had been taken.**

In the 1949 Michigan contested election case of Stevens v Blackney (§ 55.3, infra), the Subcommittee on Elections responded on Feb. 15, 1949, to a letter from a contestant, informing him that the House could, "on recommendation from the committee, order a recount *after* all testimony had been taken, in precincts where the official returns were impugned by such evidence." [Emphasis supplied.]

As the minority report later pointed out, before the contest was presented to the House on Sept. 22, 1949, "There was nothing before the subcommittee or the House except the contestant's notice and contestee's answer thereto."

### *Evidence From Ex Parte Proceedings*

**§ 34.3 Transcripts of testimony before local canvassing**

5. § 34.1, infra.

**boards, taken ex parte and prior to the initiation of the election contest in the House, are incompetent as evidence and will not be considered by the Committee on Elections.**

In Hicks v Dondero (§ 53.1, infra), a 1945 contest, the contestant submitted two copies of transcripts of proceedings before the Wayne County, Michigan Canvassing Board, which were held prior to the initiation of his election contest in the House. The Committee on Elections ruled that such transcripts were entirely ex parse and incompetent as proof of any issues urged by contestant.

### *Testimony at State Inquiry*

**§ 34.4 A committee on elections stated that it was not bound by the actions of a state court in supervising a recount; but the committee denied contestant's motion to suppress testimony obtained at a state inquiry where the contestant had initiated the state recount procedure and would be estopped from offering rebuttal testimony as to the result of the recount.**

In Kent v Coyle (§ 46.1, infra), proceedings took place as described above. A partial recount had been conducted by a state court pursuant to state law; but a committee on elections held that contestant had failed to sustain the burden of proof of fraud where a discrepancy between the official returns and the partial recount was inconclusive.

## § 35. Burden of Proof

Under the Federal Contested Elections Act, the burden is on contestant to prove that the election results entitled him to contestee's seat, even where the contestee fails to answer the notice of contest or otherwise defend as provided by such act,[6] and even in opposition to a motion to dismiss submitted by contestee in advance of submission of formal evidence.[7]

### *Administration of Oath as Prima Facie Evidence of Right to Seat*

**§ 35.1 The administration of the oath to the contestee may establish his prima facie right to the seat.**

In the 1965 Mississippi election contest of Wheadon et al. v

6. 2 USC § 385.
7. See Tunno v Veysey, discussed in § 35.7, infra.

Abernethy et al. [The Five Mississippi Cases] (§ 61.2, infra), the committee report and comments by members of the committee, during debate on the resolution dismissing the contest, suggested that the Committee on Elections regarded the administration of the oath to the contestees as establishing their prima facie right to the seats.[8]

### *Standard of "Fair Preponderance of Evidence"*

**§ 35.2 In an election contest, contestant has the burden of proof to establish his case, on the issues raised by the pleadings, by a fair preponderance of the evidence.**

In Scott v Eaton (§ 50.2, infra), a 1940 California contest, an elections committee summarily ruled that a contestant had not established by a fair preponderance of the evidence that contestee had violated a California statute or the Federal Corrupt Practices Act, or that any such violation directly or indirectly prevented contestant from receiving a majority of votes cast.[9]

### *Burden of Showing Results of Election Would Be Changed*

**§ 35.3 In the absence of a showing that the results of the election would be changed, lack of knowledge of registration laws and improper enforcement by officials charged with their administration are not such irregularities as will void the results of an election.**

In Wilson v Granger (§ 54.5, infra), a 1948 Utah contest, the majority report of the Committee on House Administration acknowledged "widespread and numerous errors and irregularities in many parts of the district," but nevertheless upheld the 104 vote lead of the contestee because the correct result of the election was not affected by the irregularities shown. The House agreed to a resolution dismissing the contest.

**§ 35.4 Where the contestant alleges that procedural requirements in an election have not been complied with,**

8. See also the debate on H. Rept. No. 89-602 disposing of the election contest of Peterson v Gross (§ 61.3, infra), for more authority that the administration of the oath establishes a prima facie right to the seat, with resulting evidentiary burdens imposed on the contestant. 111 CONG. REC. 26499, 89th Cong. 1st Sess., Oct. 11, 1965.

9. As to the "fair preponderance" standard, see also Gormley v Goss, a 1934 Connecticut contest (§ 47.9, infra).

**he has the burden of showing that, due to fraud and irregularity, the result of the election was contrary to the clearly defined wish of the constituency involved.**

In Clark v Nichols (§ 52.1, infra), a 1943 Oklahoma contest, the Committee on Elections determined that contestant had proven certain irregularities relating to the failure of local officials in certain precincts to keep registration books and to comply with various administrative requirements imposed by state law, but dismissed the contest for failure of the contestant to bear the burden of showing fraud and irregularity by any election official whereby contestant was deprived of votes.

**§ 35.5 A contestant who alleges that voters had been registered who did not reside in the precincts where registered must present such evidence of these irregularities as to leave no doubt of their existence.**

In the 1951 Pennsylvania contested election case of Osser v Scott (§ 56.5, infra), the contestant's testimony enumerated instances where registrants had given fictitious residence addresses, and indicated that as to such registrants contestant had filed some 2,000 "strike-off petitions." The committee, however, found that no evidence had been presented to show that any of the illegal registrants had voted for the contestee. Thus, the committee concluded that the contestant had not presented sufficient evidence to impeach the returns.

**§ 35.6 An elections committee will recommend dismissal of a contest where there is no evidence that the election was so tainted with the misconduct of election officers that the true result cannot be determined.**

In the 1951 Pennsylvania contested election case of Osser v Scott (§ 56.5, infra), the contestant contended, as stated in the report, that he was unable to have "honest-to-goodness Democrats file for minority inspector [poll watchers]" and that the Republican Party "will register persons as Democrats in order to file them for minority inspector and to complete the election board." However, the committee recommended dismissal, which the House subsequently agreed to, because no evidence was presented to show "that the election was so tainted with fraud, or with the misconduct of the election officers, that the true result cannot be determined."

**§ 35.7 The requirement that the contestant in a contested election case make a claim to the seat carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone, could seat the contestant.**

Under the new contested election statute, contestant has the burden of resisting contestee's motion to dismiss, prior to the submission of evidence and testimony, by presenting sufficient evidence that the election result would be different or that contestant is entitled to the seat. Thus, in the 1971 California election contest of Tunno v Veysey (§ 64.1, infra), the committee report recommended dismissal of the contest where the contestant merely alleged that election officials had wrongfully and illegally canceled the votes of 10,000 potential voters, without any evidence as to how these potential voters would have voted.

The committee report noted the following burden of presenting evidence:

> Under the new law then the present contestant, and any future contestant, when challenged by motion to dismiss, must have presented, in the first instance, sufficient allegations and evidence to justify his claim to the seat in order to overcome the motion to dismiss.

The report continued:

> The major flaw in the contestant's case is that he fails to carry forward with his claim to the seat as required by the precedents of the House of Representatives and the Federal Contested Elections Act. A bare claim to the seat as the contestant makes in his notice of contest without substantiating evidence ignores the impact of this requirement and any contest based on this coupled with a request for the seat to be declared vacant must under the precedents fail. The requirement that the contestant make a claim to the seat is not a hollow one. It is rather the very substance of any contest. Such a requirement carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone could seat the contestant.
>
> That the contestant in the present case fails to do this is quite clear. If all of his allegations were found to be correct he would still not be entitled to the seat. It is perhaps stating the obvious but a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly. It involves the possibility of rejecting the certified returns of a state and calling into doubt the entire electoral process. Thus the burden of proof placed on the contestant is necessarily substantial.

The House agreed to a resolution dismissing the contest.[10]

**10.** This was the first election contest arising under the present Federal

### *Burden of Establishing Claim to Seat*

**§ 35.8 Merely showing that some voters have been precluded from voting through errors of the election officials does not satisfy the contestant's burden of establishing his claim for the seat.**

In the 1971 California election contest of Tunno v Veysey (§ 64.1, infra), the contestant alleged that the election officials had wrongfully and illegally canceled the registration of approximately 10,000 voters. However, the contestant did not show how these potential voters would have voted, and the election committee, after expressing a hesitancy to invalidate an election under these circumstances, held that the contestant had not carried through on his burden of establishing his claim to the seat under the Federal Contested Elections Act [specifically, 2 USC §§ 382, 383] and the precedents of the House.

### *Allegations of Improper Expenditures*

**§ 35.9 A contestant has the burden of proof with respect to his allegations of improper campaign expenditures by contestee.**

In Lovette v Reece (§ 47.11, infra), a 1934 Tennessee contest, the committee found that contestant's allegations of improper campaign expenditures by contestee were based on hearsay evidence related to other elections, and that the contestant had failed to sustain his burden of proof.

### *Evidence Not Compelling Examination of Ballots*

**§ 35.10 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; and (b) that the ballots since the election have been so rigorously preserved that there has been no reasonable opportunity for tampering with them.**

In O'Connor v Disney (§ 46.3, infra), a 1932 Oklahoma contest, a committee on elections refused to conduct a partial recount where contestant had failed to sustain the burden of proving fraud or irregularities sufficient to change

Contested Elections Act, 2 USC §§ 381 et seq.

the result of the election, and of proving such proper custody of ballots as to reasonably prevent tampering with them.

## § 36. Presumptions

### *Official Returns as Presumptively Correct*

**§ 36.1 A contestant in an election contest must overcome the prima facie evidence of the correctness of the election as established by the official returns.**

In the 1934 Illinois election contest of Weber v Simpson (§ 47.16, infra), after the contestant examined the tally sheets in all of the 516 precincts of the district and found discrepancies in 128 of the precincts, he requested that the elections committee order a recount based on the discrepancies shown. The committee denied this request, finding no evidence of irregularities, intimidation, or fraud in the casting of ballots, concluding that "contestant has failed to overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee."

**§ 36.2 The burden is on the contestant to present sufficient evidence to rebut the presumption that official returns are proof of the result of an election.**

In the 1951 Pennsylvania contested election of Osser v Scott (§ 56.5, infra), the committee granted the contestant full opportunity for presenting testimony and hearing arguments of counsel supporting his claim, but still concluded that the contestant had not sustained his contention, stating:

> The returns of the election . . . and the certificate issued to [the contestee] are presumptive proof of the result of that election which will prevail unless rebutted by proper evidence.

The House then agreed to a resolution that the contestee was duly elected and entitled to his seat.

Similarly, in O'Connor v Disney (§ 46.3, infra), the Committee on Elections applied the principle that the burden of coming forward with evidence to meet or resist the presumption of irregularity rests with the contestant, and found that contestant had failed to overcome the presumption of correctness of official returns.

**§ 36.3 Election returns prepared by election officials regularly appointed under the laws of the state where the election was held are presumed to be correct until**

**they are impeached by proof of irregularity or fraud.**

In Clark v Nichols (§ 52.1, infra), a 1943 Oklahoma contest, an election contest involving alleged irregularities relating to precinct registration books, the Committee on Elections cited the presumption as to the correctness of election returns, and indicated that neither the House nor its committees were constituted as mere boards of recount.

**§ 36.4 A contestant must overcome the presumptions that official returns are prima facie evidence of the regularity and correctness of an election and that election officials have legally performed their duties.**

In Chandler v Burnham (§ 47.4, infra), a 1934 California contest, contestant alleged that in 14 precincts there had been instances of illegal ballot counting, improperly constituted election boards, unsworn officials, and unattested tally sheets as well as irregular ballots and envelopes, all of which warranted the rejection of the returns in total. The Committee on Elections determined that contestant failed to establish fraud or connivance on the part of the contestee or any election official. The committee noted that (1) the official returns are prima facie evidence of the legality and correctness of official action, (2) that election officials are presumed to have legally performed their duties, and (3) that the burden of coming forward with evidence to meet or resist these presumptions rests with the contestant.

**§ 36.5 A contestant must overcome the presumptions that the official returns are prima facie evidence of the regularity and correctness of an election, and that election officials have performed their duties honestly. An elections committee will not determine certain irregular actions by precinct officers at an election supervised by a nonpartisan board to be fraudulent or the result of a conspiracy with contestee, absent a "fair preponderance of evidence" adduced by contestant to the contrary.**

In Gormley v Goss (§ 47.9, infra), a 1934 Connecticut contest, according to the official returns, contestee received 42,132 votes to 42,054 votes for contestant—a majority of 78. Contestant alleged that a precinct official, acting fraudulently and in conspiracy with contestee, entered the voting booth and spoke to voters who

were casting ballots. The committee found that confusion existed among voters with regard to voting on a certain proposition and as to its placement on the voting machine. The committee further found that many voters were seeking information in this respect and that they were merely given assistance by the official in question. The committee also determined that the intent of the voter was not vitiated by any interference with the keys on the voting machine. The committee concluded that the contestant had failed to establish the allegations contained in the notice of contest, and had failed by a fair preponderance of the evidence to establish any fraud or conspiracy.

**§ 36.6 Where the contestant has not clearly presented proof sufficient to overcome the presumption that the returns of the returning officers were correct, the elections committee will not order a recount.**

In the 1965 Iowa election contest of Peterson v Gross (§ 61.3, infra), there was no procedure available under Iowa law for a recount in a contest in which the sitting Member had won by only 419 votes. The contestant, who made no allegations of fraud against anyone, sought to have the House order a recount, but the elections committee declined to do so in the absence of proof overcoming the presumption that the returns of the election officers were correct.

**§ 36.7 The official returns of an election are prima facie evidence of its regularity and correctness.**

In the 1934 Illinois election contest of Weber v Simpson (§ 47.16, infra), the elections committee recommended adoption of a resolution dismissing the contest and declaring the contestee to be entitled to the seat after it concluded that the "contestant has failed to overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee."

### *Effect of Absence of Witnesses for Contestant*

**§ 36.8 Where a contestant is unable to produce witnesses as to any errors in the counting of ballots in certain precincts, an election committee may presume that there has been a fair and honest count in those precincts.**

In the 1949 Michigan election contest of Stevens v Blackney (§ 55.3, infra), although the con-

testant produced evidence showing that the counting in four of 207 precincts had been erroneous, the majority of the committee applied a principle of evidence to presume that the contestant's failure to produce party election officials and challengers from any of the other precincts as witnesses must have been "because their testimony would show an honest and fair count." The House agreed to a resolution seating the contestee.

### *Correctness of Tally Sheets*

**§ 36.9 An official return based on tally sheets and check lists is only prima facie evidence of the correctness of the result of the election. This presumption may be overcome by a recount of all ballots where such ballots are preserved as required by law and their integrity is unimpeached.**

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, one of the parties claimed that he had not received credit, upon recount, for ballots from a certain precinct. The committee ruled that the presumption as to the correctness of the official return had been overcome by a recount of all ballots, including those from the disputed precinct; the committee accepted the recount as the best evidence of the number of votes cast, and noted that the ballots had been preserved as required by law and their integrity unimpeached.

### *Effect of Failure to Challenge Voter*

**§ 36.10 Persons voting without challenge on election day are presumed to be entitled to vote, and election officials receiving the votes are presumed to do their duty properly.**

In the New York contested election case of Macy v Greenwood (§ 56.4, infra), arising from a 1950 election which the contestant lost by only 135 votes, contestant alleged for the first time that a number of the voters were not qualified as to residence because they had not been residents for the four months preceding the election, as required under state law. The committee observed that the contestant had not made any challenges under state law which permitted challenging of voters at the time of registration or of voting. Furthermore, the committee report could not cite a single instance wherein the House had rejected votes as illegal for the reason that the voter had not resided in the county for the statutory period of time. The report further

stated, "It is apparently the settled law of elections that, where persons vote without challenge, they are presumed to be entitled to vote and that the election officers receiving the votes did their duty properly and honestly."[11]

### *Effect of Closeness of Result*

**§ 36.11 The mere closeness of the result of an election raises no presumption of fraud, irregularity, or dishonesty. Fraud is never presumed but must be proven.**

In Chandler v Burnham, a 1934 California contest (§ 47.4, infra), the official returns gave to contestee a plurality of 518 votes from a total of 87,061 votes cast. The contestant alleged a wide variety of procedural irregularities on the part of election officials. The committee determined, however, that contestant had failed to establish fraud or connivance and cited the general rules that fraud is never presumed, and that the mere closeness of the result raises no presumption thereof.

## § 37. Ballots

### *Ambiguous Ballots*

**§ 37.1 In determining voter intention, an elections committee should distinguish between ambiguous ballots, which permit examination of the circumstantial evidence surrounding an election to determine voter intent, and ballots mistakenly marked for two parties, as to which voter intent would be a matter of conjecture.**

In the 1934 Connecticut election contest of Fox v Higgins (§ 47.8, infra), the "Australian ballot," on which voters could vote a "straight ticket" by marking an "X" in the circle above a party column, was employed as the official ballot. State law voided ballots marked with an "X" in more than one party circle. By inadvertence, the committee found, the contestee had caused the ballots to be printed with the party name "Wet Party" near the question on repeal of the 18th amendment. The contestee had been charged with the responsibility of preparing the ballots, being the Connecticut secretary of state at the time. The effect of the juxtaposition was that, as several witnesses testified, they inadvertently voted for more than one political party when they intended to vote their regular party affiliation and for repeal, and had mistakenly voted for the "Wet Party," a local political entity.

**11.** Citing the election contest of Finley v Bisbee, 2 Hinds' Precedents § 933.

The committee found, however, that the question of the intention of the voters of the rejected ballots was a matter of conjecture and that the ballots were rightly rejected as this "was not the case of an ambiguous or doubtful ballot, where the committee can look at the circumstances surrounding the election explaining the ballots."

### *Ballots as Best Evidence*

**§ 37.2 In an election contest, the best evidence as to the number of ballots cast, and for whom they were cast, is the ballots themselves, and not tally sheets or check lists, provided the integrity of the ballot box has been pre-served and there is no evidence that the boxes have been tampered with or molested.**

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, the issue to be decided was whether the tally sheet and check list of a certain precinct were to be considered the best evidence of the vote. The minority of the Committee on Elections claimed that the number of ballots cast as determined on recount, had been successfully impeached by contrary evidence of check lists, tally sheets, and sworn depositions of voters. But the committee did not accept such tally sheets and check lists as the best evidence of the number of votes cast for the parties in the precinct, and accepted the recount of the ballots in that precinct as the best evidence thereof.

### *Method of Proportionate Deduction*

**§ 37.3 Where it is impossible to determine for which candidate illegal absentee votes were cast, the proportionate deduction rule for deducting such votes is followed.**

In the 1961 Indiana investigation of the right of Roush or Chambers to a seat (§ 59.1, infra), the Committee on Elections found that in one precinct 42 absentee ballots had been illegally procured and cast, though there was no proof as to the person for whom they were cast. The committee first determined the total votes cast for each candidate in the precinct (615 for Mr. Roush and 352 for Mr. Chambers). The committee then determined the number of absentee ballots cast in the precinct for Mr. Roush, 20, and for Mr. Chambers, 42. Of the 62 total absentee ballots cast in the precinct, then, 68 percent were cast for Mr. Chambers and 32 percent were cast for Mr. Roush. Applying these percentages to the 42 votes

to be deducted, the subcommittee deducted 29 votes from Mr. Chambers' total and 13 votes from Mr. Roush's total. In following this procedure, the committee report cited precedents of the House in which this proportionate deduction method had been followed: Oliver v Hale (§ 57.3, infra); Macy v Greenwood (§ 56.4, infra); Wickersham v Sulzer and Grigsby (6 Cannon's Precedents § 113); Chandler v Bloom (6 Cannon's Precedents § 160); Bailey v Walters (6 Cannon's Precedents § 166); and Paul v Harrison (6 Cannon's Precedents § 158).

**§ 37.4 Where absentee ballots should be rejected due to invalid envelopes and applications filed by voters, but it cannot be determined to which ballots the invalid material relates, an elections committee will apply the method of proportionate deduction as an equitable method of deducting votes from the totals of each candidate.**

In the Maine contested election case of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, the committee cited the contested election case of Macy v Greenwood (§ 56.4, infra), as precedent for an equitable method of deducting 109 absentee ballots from the totals of the contestant and contestee. This method presupposed that each candidate received invalid ballots in the same proportion that he received his total vote in the election precinct. Thus, by dividing the number of absentee votes received by a candidate in a precinct by the total number of absentee votes cast in that precinct, and by then multiplying the fraction thereby obtained by the number of absentee votes rejected in the precinct, the committee determined that 86 votes should be deducted from the contestee's total and 23 votes from the contestant's total.

**§ 37.5 When it cannot be ascertained for which candidate the illegal votes were cast, the votes will be deducted proportionally from both candidates according to the entire vote returned for each candidate.**

In the New York election case of Macy v Greenwood (§ 56.4, infra), the contestant, who had lost by only 135 votes, alleged that 932 voters were not qualified as to residence because they had entered the district and voted although they had not been "for four months a resident of the county" as required by state law.

Although the committee found additional basis for disregarding the contestant's challenge and recommending dismissal of the contest, the committee report specifically stated the "general rule" that "had it found the 932 votes illegally cast, the votes presumably would be deducted proportionally from both candidates, according to the entire vote returned for each." The House subsequently dismissed the contest.

### *Interpretations of "Straight Ticket" Votes*

**§ 37.6 Where state law permits "straight ticket" voting by a mark in the appropriate circle, and also permits voting for only part of a ticket, a candidate for Representative is not entitled to ballots cast for his party's Presidential nominee but not marked for Representative.**

In Ellis v Thurston (§ 47.6, infra), a 1934 Iowa contest, the contestant claimed all ballots that were cast for the Presidential nominee of his party, but which indicated no choice for Representative. The Committee on Elections ruled that voters in marking the squares opposite the Presidential and Vice Presidential candidates did not intend to vote a straight party ticket, as the statute provided that a cross be placed in a separate party circle in order to cast such a vote. The committee dismissed contestant's claim that "the intent of the voter should be given effect regardless of local Iowa laws," and refused to assume "that because voters voted for Roosevelt, or Hoover, who headed the respective tickets, that they intended to vote also for the candidates for Congress toward whom the voters indicated their neutrality."

**§ 37.7 In an election involving the use of "straight ticket" ballots, a candidate is entitled to the number of votes equal to the total number of "straight ticket" ballots cast for his party and on which his name appears undisturbed.**

In Kunz v Granata (§ 46.2, infra), a 1932 Illinois case involving the Australian (or so-called "straight ticket") balloting system, the issue was whether the defeated candidate, a Democrat, was entitled to be credited with the same number of votes cast for his party by the "straight ticket" voters.

The majority of the Committee on Elections found in favor of Democrat Kunz, notwithstanding the contention of the minority

that a number of straight Democratic ballots had been marked for his Republican opponent, Granata. The majority took the view that Mr. Kunz was entitled to every "straight ticket" ballot on which his name appeared undisturbed along with the names of the other Democratic candidates. The fact that the contestant did not receive the "straight ticket" vote in many of the precincts was considered conclusive evidence of fraud or gross irregularity, justifying a recount.

When the "straight ticket" vote was given contestant, he overcame the contestee's apparent majority, and was eventually seated as the Representative from his district.

**§ 37.8 An elections committee will not presume ballots marked for contestant's party Presidential nominee to have been intended as "straight ticket" votes where state law provided a separate circle for casting "straight ticket" ballots.**

In the 1934 Iowa contested election of Ellis v Thurston (§ 47.6, infra), the committee dismissed the contestant's claim that "the intent of the voter should be given effect regardless of local Iowa laws," holding instead that "to presume now that the voters intended to vote otherwise than as expressed by their marked ballots would be to indulge in a presumption not justified in law or facts." The contestant had argued that the voters, in marking the squares opposite the Presidential and Vice Presidential candidates, intended to vote a straight party ticket, although the statute provided that a cross be placed in the party circle in order to cast such a vote. The committee ruled otherwise, however.

### *Effect of Writing in Name of Listed Candidate*

**§ 37.9 Where voters write in the name of a candidate whose name is already printed on the ballot, but do not put an "X" in the box on the ballot opposite the name, the ballot may still be valid.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections validated two ballots on which the voter had written in the name of the candidate, but had not marked an "X" in the box opposite his printed name. In the absence of an Arkansas case on point, the committee cited a Pennsylvania case as authority.

### *Using Other Than Specified Mark*

**§ 37.10 Where the voter places some mark other than an "X" in the box opposite a candidate's name on a ballot, the ballot may still be valid if the intention of the voter is clear.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections validated 42 of 43 ballots on which the voters had placed some mark other than an "X" or check in the square opposite the name of the candidate, as the intention of the voter was clear.

**§ 37.11 Where the name of a candidate has been written in and the box opposite his name checked, rather than "Xed" as required, the ballot may nevertheless be held valid.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the elections committee found the intention of the voters was clear and ruled valid 236 ballots in which the voters had written in the name of a write-in candidate and placed a check in the box on the ballot opposite his name, instead of placing an "X" in the box.

### *Incorrect or Wrong Name for Write-in Candidate*

**§ 37.12 Although a misspelling in the name of a write-in candidate on a ballot does not necessarily invalidate it, where the name provided is wrong or so badly spelled as to produce confusion as to the intent of the voter, the ballot should be rejected.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections validated 1,035 of 1,097 ballots on which the name of the write-in candidate was misspelled or only the last name used. The committee invalidated those ballots on which the wrong given name was written or the surname so incorrectly spelled as to render the intent of the voter uncertain.

### *Stickers Used in Lieu of Writing in Name*

**§ 37.13 Where state law permits, stickers bearing a candidate's name may be used in lieu of a "write-in" for the candidate.**

In the 1959 investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections determined that an opinion of the state attor-

ney general, issued immediately prior to the election, to the effect that stickers were legal, was binding on the clerks and judges and they were required to count the sticker votes. Neither the defeated candidate nor any voter had appealed the attorney general's opinion. The committee also cited a 1932 Arkansas Supreme Court decision that ballots bearing stickers distributed at the polls were legal, as well as the 1919 Massachusetts contested election case of Tague v Fitzgerald (6 Cannon's Precedents § 96), in support of the proposition that the use of stickers in balloting should not void the ballots involved.

**§ 37.14 Where the wrong end of a sticker has been placed on a ballot or the sticker partly covers marks on the ballot for the other candidate, the ballot is invalid.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections ruled invalid 52 ballots on which the wrong end of a sticker bearing the name of a write-in candidate had been placed on the ballot. The committee also found invalid seven ballots upon which stickers had been placed over or partially over marks for the other candidate.

***Ballot Marked for Both Candidates***

**§ 37.15 Where the name of a write-in candidate has been written in, or placed on the ballot by sticker, and the box opposite the name of the other candidate has also been marked, a ballot will be declared invalid.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections ruled invalid 28 ballots, on the ground that a voter had voted twice on the same ballot for the same office.

***Failure to Mark in Designated Place***

**§ 37.16 Where the intent of the voter can be ascertained, a vote is valid even though the voter fails to mark a cross in the square provided on the ballot.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections ruled that 415 ballots which had the name of a write-in candidate written in, or placed on the ballot by sticker, but which did not contain any mark in the box opposite the name, were valid. In ruling that

the cross in the box opposite the name was not necessary, the committee cited the election contest of Tague v Fitzgerald (6 Cannon's Precedents § 96).

### *Necessity of Detaching Stub From Ballot*

**§ 37.17 A ballot will be invalid if it does not have the stub detached as required by state law.**

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§ 58.1, infra), the Committee on Elections cited an Arkansas statute which required that the voter detach the stub from the ballot and deposit it separately, in ruling that each of 48 ballots which did not have the stubs detached were invalid. The committee also cited a Kentucky case which declared that detaching the stub is mandatory in order to comply with requirements for preserving the secrecy of the ballot.

### *Marking With Improper Instrument*

**§ 37.18 An elections committee has regarded state laws as merely directory which provided that ballots were invalid if marked with some instrument other than a blue pencil.**

In the 1961 Indiana investigation of the right of Roush or Chambers to a seat in the House (§ 59.1, infra), the Committee on Elections ruled that 436 ballots that were marked with other than a blue pencil were valid, despite Indiana court decisions that had invalidated ballots marked with ink or lead pencil. The committee cited House precedents, Goodich v Bullock and Kearby v Abbott (2 Hinds' Precedents, §§ 1038, 1076 respectively), in which the House had held state statutory requirements that ballots be marked with designated instruments to be directory, and not mandatory.

### *Integrity of Ballots*

**§ 37.19 The integrity of ballots is preserved where it is shown that election officials have supervised the counting and storage of such ballots in conformity with state law.**

In Kunz v Granata (§ 46.2, infra), a 1932 Illinois contest, a contention that the integrity of the ballots had not been preserved was rejected by the Committee on Elections majority, where it was found that the ballots had been preserved as provided by law and kept under the supervision and control of the clerk of the Board of Election Commissioners, and that the ballot boxes were all opened

under his supervision, and that after being counted the ballots were replaced in boxes as required by law and put in the proper depository.

**§ 37.20 A committee on elections refused to conduct a partial recount, in part because contestant failed to prove such proper custody of ballots as to reasonably prevent the opportunity for tampering with them.**

In O'Connor v Disney (§ 46.3, infra), the committee on elections applied the principle that, to entitle a contestant in an election case to an examination of the ballots, he must establish, in part, that the ballots since the election have been so rigorously preserved that there has been no reasonable opportunity for tampering with them. In this case, some actual evidence of tampering with the ballot box existed.

### *Ballot Tallies*

**§ 37.21 An uncorroborated tally of ballots by contestant, taken without the knowledge of contestee during an examination thereof by both parties, will be rejected by an elections committee as an inadmissible self-serving declaration.**

In Chandler v Burnham (§ 47.4, infra), a 1934 California contest, the official returns gave a plurality of 518 votes to contestee from a total of 87,061 votes cast. At the time, state law did not provide machinery for conducting a recount. Contestant alleged that his own informal recount of approximately one-third of the ballots cast showed that he had been elected. He contended that during the taking of testimony under subpena, at which time the ballots had been examined in the presence of both parties and their counsel, he had kept a tally of votes cast, including certain ballots he declared to be void or otherwise improper. The committee found that since contestee had not known that contestant was conducting such a tally, and was not given the opportunity to identify the ballots tallied, the testimony of contestant was uncorroborated and constituted a self-serving declaration of no probative value. The committee therefore ruled out, as inadmissible, evidence concerning the tally as well as the tally itself. The committee report was also critical of inconsistent or contradictory allegations it attributed to contestant—namely, that on the one hand, an examination of the ballots as shown by his tally indicated that he had been elected

and, on the other hand, that the ballots were not preserved and returned in the manner required by law. The committee ruled that these dual contentions could not be maintained, and indicated that votes could not be asserted as legal for one purpose and illegal for another.

## § 38. Determination of Voter Intention

### *Voter Intention as Paramount Concern*

**§ 38.1 In the absence of proof of fraud, the intent of the voter rather than a showing of irregular official conduct should govern the decision whether to disenfranchise those voters.**

In the 1933 Maine contested election of Brewster v Utterback (§ 47.2, infra), after the contestant had apparently abandoned his allegations of fraud and relied upon proof of negligence and irregularities by officials to support his contest, the committee accepted the recommendations of an advisory opinion of the Supreme Court of Maine rendered to the Governor and his executive council. Accordingly, the committee refused to "disenfranchise the voters in the 16 precincts . . . because of some alleged breach of official duty of the election of officers."

**§ 38.2 An elections committee has applied state laws that required ballots not be counted if the voter's choice could not be ascertained for any reason.**

In the 1958 Maine contested election case of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, the Committee on House Administration considered 142 disputed regular ballots and applied the state law which required that a ballot could not be counted "if for any reason it is impossible to determine the voter's choice." The application of the law made little difference, however, as the committee determined that 57 votes had been cast for each candidate and that 28 votes could not be ascertained.

**§ 38.3 In determining voter intention, an elections committee should distinguish between ambiguous ballots, which permit examination of circumstantial evidence to determine voter intent, and ballots mistakenly marked for two parties, as to which voter intention becomes a matter of conjecture.**

In Fox v Higgins (§ 47.8, infra), a 1934 Connecticut election con-

test, several witnesses testified that, in addition to their regular party affiliation, they had intended to vote for repeal of the 18th amendment, and had mistakenly voted for the "Wet Party." The committee noted that such ballots were not of the ambiguous or doubtful type, so as to permit consideration of the circumstances surrounding the election and explaining the ballot. The committee found the question of intention of the voters of such ballots to be a matter of conjecture. It concluded that the ballots were unreliable and properly rejected.

### *Effect of State Law*

**§ 38.4 Although the House of Representatives generally follows state law and the rulings of state courts in resolving election contests, this is not necessarily so with respect to the validity of ballots where the intention of the voter is clear and there is no evidence of fraud.**

In the 1961 Indiana investigation of the right of Roush or Chambers to a seat in the House (§ 59.1, infra), the Committee on Elections report posed, as the central issue to be decided, the question of whether the "House will necessarily follow State Court decisions in ruling on validity of questionable ballots, particularly when those decisions seem to be contrary to the intention of the voter in honestly trying to indicate a choice between candidates." The report then cited several "instances in which the House, through its Committee on Elections, has held that decisions of a state court are not binding on the House in the examination of ballots to correct deliberate or inadvertent mistakes and errors," specifically citing Brown v Hicks (6 Cannon's Precedents § 143), and Carney v Smith (6 Cannon's Precedents § 146).

**§ 38.5 Where uncertainty existed in state law with respect to the validity of write-in votes in general elections, an elections committee decided that the will of the voters should not be invalidated by the uncertainty in the state law.**

In the 1959 Arkansas investigation of the right of Dale Alford (§ 58.1, infra), to a seat in Congress, following his election victory as a write-in candidate, the elections committee disregarded an uncertainty which existed in state law with respect to write-in votes in general elections, and decided that the will of the voters should not be invalidated by an

uncertainty in state law. The committee noted that it had been the custom in Arkansas to accept write-in votes, that spaces had been provided on the ballots for write-in votes, and the House had always recognized the right of a voter to write in the name of his choice.

## K. INSPECTION AND RECOUNT OF BALLOTS

### § 39. Generally

***Recount by Stipulation of Parties***

**§ 39.1 By stipulation, the parties may agree to conduct a recount during an extension of time granted by the House for the taking of testimony.**

In Moreland v Schuetz (§ 52.3, infra), a 1944 Illinois contest, the parties to an election contest agreed to conduct a recount in those wards where the vote had been questioned by contestant.

**§ 39.2 The parties to an election contest may conduct their own recount, showing that one of the parties has received a majority of the votes cast, and this may be made the basis of a stipulation upon which the House may act.**

In Sullivan v Miller (§ 52.5, infra), a 1943 Missouri contest, the parties, having been denied a joint application for recount by the House, agreed to conduct their own recount, the results of which showed that contestee had received a majority of all votes cast. The House agreed to a resolution dismissing the case, based on a stipulation of the parties to that effect.

***Unsupervised Recount***

**§ 39.3 The contestant may not, of his own accord and without evidence, conduct a recount of ballots without supervision of the House.**

In the 1949 Michigan contested election case of Stevens v Blackney (§ 55.3, infra), prior to presentation of the contest to the House, the contestant, on Feb. 10, 1949, applied to the Committee on House Administration to send its agents to a conduct recount. The committee, however, declined to do so on the ground that the probability of error should first be shown. The contestant then had a notary public of his own selection issue a subpena duces tecum to

the local election officials to obtain possession of the ballots and voting machines. The local officials refused to honor the subpena and the Subcommittee on Elections "sustained the action of the election official." In a letter from subcommittee Chairman Burr P. Harrison, of Virginia, to the local officials, it was stated:

> Precedents of the House of Representatives clearly establish that in a contested election case ballots should be inspected and preserved in strict conformity with State law so that their inviolability is unquestioned. No action should be taken by either contestant or contestee with reference to ballots that does not follow the law of the State.
>
> The official count of the ballots is presumed correct, and I am certain that this presumption will not be brought into question by any unauthorized recount which is made contrary to State law or under circumstances which do not give full protection to both contestant and contestee.

### *Recount Pursuant to State Law, With House Supervision*

**§ 39.4 Where state law permits, a party to an election may request an inspection and recount of all votes cast, to be conducted by bipartisan teams and to be supervised by representatives of a special House committee to investigate campaign expenditures.**

In the 1958 Maine contested election case of Oliver v Hale (§ 57.3, infra), arising from the Sept. 10, 1956, election, the contestant asked for an inspection and recount as permitted by state law, of all votes cast, which was conducted under the supervision of five teams of two men each (with each party represented on each team) and with representatives of the "Special Committee to Investigate Campaign Expenditures of the House of Representatives." The report of this committee was submitted Dec. 22, 1956. The majority of the committee recommended that the Committee on House Administration of the 85th Congress immediately investigate the approximate 4,000 ballots in dispute and report to the House by Mar. 15, 1957. The minority contended that a committee of the 84th Congress should not "purport to dictate to the Committee on House Administration of the 85th Congress how it shall conduct its operations or when it shall file its report."

### *Significance of Number of Disputed Ballots*

**§ 39.5 A committee finding of balloting irregularities in an election contest will not provide a sufficient basis for overturning the election**

**where the disputed ballots are so few in number that, even if disregarded, they would not change the result of the election.**

In Miller v Cooper (§ 48.3, infra), involving a 1936 contest in the 19th Congressional District of Ohio, the contestant alleged that certain irregularities and frauds had occurred in Mahoning County, but not in the other two counties of the district. The committee found some irregularities with respect to the destruction of ballots, tabulations of the votes cast, and the method of conducting the election in Mahoning County. The committee further found, however, that even if it should disregard entirely the ballots cast in Mahoning County, it would not affect enough votes to change the result of the election.

### *State Court Recount*

**§ 39.6 A committee on elections stated that it was not bound by the actions of a state court in supervising a recount; but the committee denied contestant's motion to suppress testimony obtained at a state inquiry where the contestant had initiated the state recount procedure and would be estopped from offering rebuttal testimony as to the result of the recount.**

In Kent v Coyle (§ 46.1, infra), a partial recount was conducted by a state court pursuant to state law; but a committee on elections held that contestant had failed to sustain the burden of proof of fraud where a discrepancy between the official returns and the partial recount was inconclusive.

## § 40. Grounds

The precedents indicate that a recount will be ordered only when the contestant has satisfied his burden of proving that such recount would alter the result of the election,[12] based on evidence sufficient to raise at least a presumption of irregularity or fraud.[13] A mere suggestion of, or a speculative possibility of, error, is not sufficient for an election committee to order a recount.[14]

### *Justification for Recount*

**§ 40.1 An application for a recount of votes in an election contest must be based on evidence sufficient to raise at least a presumption of irregularity or fraud, and a re-**

12. See §§ 40.5–40.7, infra.
13. See §§ 40.1, 40.4, infra.
14. See §§ 40.1, 40.2, infra.

**count will not be ordered on the mere suggestion of possible error.**

In Swanson v Harrington (§ 50.4, infra), a 1940 Iowa contest, the Committee on Elections determined the central issue to be whether the contestant could show, by a preponderance of the evidence, that an application for recount was justified due to fraud or irregularity. The committee concluded that contestant had failed to carry the burden of showing that, due to fraud and irregularity, the result of the election was contrary to the clearly defined wish of the constituency involved.

**§ 40.2 An elections committee will not conduct a recount until the necessity therefor has been established by evidence showing a probability of error.**

In the contested elections case of Stevens v Blackney from Michigan (§ 55.3, infra), presented to the House on Sept. 22, 1949, the elections subcommittee informed a contestant prior to his taking any testimony that a recount would be ordered by the committee in precincts where the official returns were impugned by evidence. The committee rationale was that the probability of error should first be shown in order to avoid subjecting a Member whose election had been certified to "fishing expeditions" and "frivolous contests."

### *Burden of Showing Fraud, Irregularity, or Mistake*

**§ 40.3 Where a party to an election contest claims that a recount of the ballots was in error, in that he was not credited with votes from a certain ballot box, he has the burden of proof to establish that through fraud or mistake such votes were removed from the box before the recount.**

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, the defeated candidate, Alphonse Roy, applied to the secretary of state of New Hampshire for a recount pursuant to state law. At the recount, at which both parties were represented, discrepancies were found resulting in a tie vote of 51,690 votes for each candidate. Both candidates appealed to the ballot-law commission for final determination. Subsequently, Arthur B. Jenks notified the Governor that he had obtained proof of a 34- or 36-vote discrepancy in his favor in the town of Newton, New Hampshire, and petitioned for a rehearing. The Committee on Elections placed the burden of

proof on Mr. Jenks to establish that there were 34 votes cast for him in the Newton precinct ballot box, which were not given to him on either recount, and "that these ballots by fraud or mistake were removed from this ballot box at some time before a recount. . . ." The committee accepted the original recount of the Newton ballots as the best evidence of the number of votes cast, and declared Mr. Roy elected by a majority.

**§ 40.4 The House will not order an elections committee to conduct a recount until the necessity has been established by evidence which warrants the presumption of fraud or irregularity.**

In the 1949 Michigan contested election of Stevens v Blackney (§ 55.3, infra), the House followed the majority report by declining to order a recount because the contestant had offered no evidence impugning the official returns. The rationale was that, unless error were first demonstrated, the Committee on Elections would be burdened with "frivolous contests"; and there was no proof that a House-conducted recount would be more accurate than the original count in any event.

***Burden of Proving Recount Would Change Election Result***

**§ 40.5 Where the contestant seeks a complete recount of votes, based on a partial recount, he has the burden of proving that such recount would change the result of the election—that is, would establish a majority for him.**

In Moreland v Schuetz (§ 52.3, infra), a 1944 Illinois contest, the committee found that a partial recount, which covered 42 percent of total votes cast and included over 56 percent of votes cast for contestee, reduced contestee's majority, but not enough to change the outcome. The committee ruled that contestant had failed to sustain his burden of proof, and indicated that the partial recount was by no means conclusive proof that the trend of the change as shown by the recount in favor of the contestant would have continued throughout the recount of all ballots.

**§ 40.6 An election committee declared that it could proceed to a recount if some substantial allegations of irregularity or fraud are alleged, and the likelihood exists that the result of the election would be different**

**were it not for such irregularity or fraud.**

See the 1965 Iowa election contest of Peterson v Gross (§ 61.3, infra), where the election committee declined to order a recount and recommended dismissal of the contest, a recommendation with which the House later agreed, after finding that the contestant (who lost by 419 votes) had not clearly presented proof sufficient to overcome the presumption that the returns of the returning officers were correct. The contestant had admitted that he was not alleging fraud on the part of anyone.

**§ 40.7 A committee on elections will not order a recount of ballots where the contestant has merely shown errors in the official return insufficient to change the results of the election.**

In the 1934 Illinois contested election of Weber v Simpson (§ 47.16, infra), the contestee won by a plurality of 1,222 votes and the contestant requested that the committee order a recount after his examination of the tally sheets in all the 516 precincts in the district found discrepancies reducing the contestee's plurality to 920 votes. The committee denied the request, however, and recommended the adoption of a resolution that the contestee was entitled to the seat.

**§ 40.8 A committee on elections refused to conduct a partial recount where contestant failed to sustain the burden of proving fraud or irregularities sufficient to change the result of the election.**

In addition to failure to sustain the burden of proof of fraud as noted above, the contestant in O'Connor v Disney (§ 46.3, infra), was held not to have sufficiently demonstrated that proper custody of ballots was maintained subsequent to the election.

## § 41. Procedure

### *Exhaustion of State Remedies*

**§ 41.1 To obtain an order from the House for a recount of votes in an election contest, contestant should show that he has exhausted state court remedies to obtain a recount under state law.**

In Swanson v Harrington (§ 50.4, infra), a 1940 Iowa contest, contestant claimed that certain votes had been cast by persons only temporarily within the district, and therefore unqualified, and sought an order from the

House that would require a recount of the total vote. The Committee on Elections found that contestant had not exhausted his remedy of obtaining a recount through the state courts, as permitted by the Iowa code, prior to appealing to the committee to order a recount. The committee rejected contestant's argument that he had been precluded from invoking state court aid as the courts had not construed the relevant state election contest laws as they applied to House seats. Although the committee claimed the power to order a recount, in its discretion, without reference to state proceedings, it indicated it would not order a recount until contestant had exhausted state court remedies. [Compare Carter v LeCompte (§ 57.1, infra), a 1957 Iowa contest in which the committee expressly rejected Swanson v Harrington.]

### *Recounts Permitted by State Law*

**§ 41.2 A recount of votes may be sought pursuant to a statute requiring the secretary of state to conduct a recount at the request of either candidate.**

In the 1938 New Hampshire election contest of Roy v Jenks (§ 49.1, infra), the original official returns from the Nov. 3, 1936, election gave Alphonse Roy 51,370 votes and Arthur B. Jenks 51,920 votes, a plurality of 550 votes for Mr. Jenks. On Nov. 9, Mr. Roy applied to the secretary of state of New Hampshire for a recount, pursuant to state law making it mandatory upon that official to conduct a recount upon request of either candidate.

### *Production of Evidence Justifying a Recount as Prerequisite*

**§ 41.3 The Subcommittee on Elections informed a contestant that the House would not order a recount without evidence and before testimony had been taken.**

In the 1949 Michigan contested election case of Stevens v Blackney (§ 55.3, infra), the Subcommittee on Elections responded on Feb. 15, 1949, to a letter from a contestant, informing him that the House could, "on recommendation from the committee, order a recount *after* all testimony had been taken, in precincts where the official returns were impugned by such evidence." [Emphasis supplied.]

### *Joint Applications for Recount*

**§ 41.4 Joint applications for a recount received by the**

**Clerk of the House are communicated by him to the Speaker together with accompanying papers, and are then referred to a committee.**

In the 1943 Missouri election contest of Sullivan v Miller (§ 52.5, infra), the two parties to an election contest filed a joint application proposing that the House order the Missouri Board of Election Commissioners to conduct a recount. The Clerk received this application and communicated it to the Speaker in a letter with accompanying papers from the parties. The Speaker then referred the materials to an elections committee.

### *Use of Auditors*

**§ 41.5 The actual counting and auditing of returns, on a recount of ballots by the Subcommittee on Elections of the Committee on House Administration, may be conducted by auditors from the General Accounting Office assigned to the committee.**

In the 1961 Indiana investigation of the right of Roush or Chambers to a seat in the House (§ 59.1, infra), the Committee on House Administration passed a motion directing the Subcommittee on Elections to conduct a recount of the ballots. The Subcommittee on Elections then proceeded to Indiana where the actual recount was performed by 13 auditors assigned to the committee from the General Accounting Office. The elections subcommittee prescribed the procedures that the auditors followed in conducting the recount.

### *Reconsideration of Action Ordering a Recount*

**§ 41.6 An elections committee may reconsider its action in ordering a recount of ballots and determine that such recount is not justified.**

In McAndrews v Britten (§ 47.12, infra), a 1934 Illinois contest, an elections committee voted to order a recount of ballots, and funds were sought to defray the expense thereof. Subsequently, however, the committee reconsidered and decided against such a recount based on a rehearing at which contestee's objections to the recount were presented.

## L. DISPOSITION OF CONTESTS; RESOLUTIONS

### § 42. Generally

#### *Disposal By House Resolution*

**§ 42.1 Election contests, if not resolved on motion or other prior proceedings, are generally disposed of by House resolution following debate on the floor of the House.**

The disposition of election contests by resolution, after debate thereon, is a procedure that has been uniformly followed in nearly all contests that have been brought before the House since the 1930's. See § 46.2, infra.

#### *Resolution Disposing of Contest as Privileged*

**§ 42.2 A privileged resolution is the procedure to declare contestee to have been elected and entitled to a seat.**

In Gormley v Goss (§ 47.9, infra), a 1934 Connecticut contest, a House resolution was called up as privileged; it was agreed to by voice vote and without debate. It provided:

> *Resolved*, that Edward W. Goss was elected a Representative in the Seventy-third Congress from the Fifth Congressional District in the State of Connecticut and is entitled to a seat as such.

**§ 42.3 A resolution disposing of an election contest is privileged and may be called up at any time.**

In McAndrews v Britten (§ 47.12, infra), a 1934 Illinois contest, a resolution disposing of an election contest was offered for the immediate consideration of the House. When a Member sought time to debate the resolution, it was withdrawn, and unanimous consent was sought that it be considered the following day after disposition of business on the Speaker's table. The Speaker, Henry T. Rainey, of Illinois, observed that such a request was not necessary, as the resolution was privileged and could be called up at any time.

**§ 42.4 A resolution disposing of an election contest is privileged, though offered in the House from the floor and not reported by an elections committee.**

In Miller v Kirwan (§ 51.1, infra), a 1941 Ohio contest, a resolution declaring a contestant incompetent to institute a contest, and dismissing the contest, was called up from the floor as a question of the privilege of the House, although it was not reported by

an elections committee. [See also Frankenberry v Ottinger, § 61.1, infra.]

**§ 42.5 A House resolution, accompanied by a committee report on an election contest, may be called up as privileged and agreed to by voice vote and without debate.**

In the 1934 California election contest of Chandler v Burnham (§ 47.4, infra), the election committee report contradicting the contestant's contentions was submitted to the House by a committee member on Apr. 19, 1934, and this same Member called up as privileged on May 15, 1934, a resolution, which was agreed to by voice vote and without debate, specifying that the contestee was elected and entitled to the seat.

***Participation of Parties; Debate on Resolution Disposing of Contest***

**§ 42.6 The parties to an election contest are sometimes permitted to be present at, or participate in, the debate in the House on the merits of the contest.**

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, the contestee, the seated Member, took the floor to plead his case during debate in the House on a resolution to seat the contestant, and a Member who called the attention of the House to the presence of the contestant in the gallery was ruled out of order. [Under Rule XXXII, *House Rules and Manual* § 919 (1973), contestants have the privilege of the floor, but not of debate.] (15)

**§ 42.7 A contestee, as sitting Member, may be permitted to participate in the debate on the resolution disposing of the contest.**

In the 1932 Illinois election contest of Kunz v Granata (§ 46.2, infra), during debate on the committee report, the spokesman for the minority view yielded for debate to the contestee, the sitting Member, who argued in his own behalf. Ultimately the House adopted a resolution that the contestant, not the sitting Member, was entitled to the seat and he thereafter appeared at the bar of

**15.** In the Five Mississippi Cases of 1965 (§ 61.2, infra), it was pointed out to the contestees that, if they were to enter into debate, the contestants might also seek recognition [contestants have floor privileges under Rule XXXII of the House]. Therefore, the Mississippi Members did not enter into debate although they did insert their remarks in the Record in explanation of their position. 111 CONG. REC. 24285, 24286, 89th Cong. 1st Sess., Sept. 17, 1965.

the House and took the oath of office.

**§ 42.8 A Member supporting the recommendation of the committee majority in an election contest is entitled to close debate.**

In Kunz v Granata (§ 46.2, infra), a 1932 Illinois contest, the Speaker, John N. Garner, of Texas, ruled that the side supporting the seating of the contestant—the committee majority—rather than the Member intending to offer a motion to recommit, was entitled to close debate.

***Extension of Time for Debate on Resolution Disposing of Contest***

**§ 42.9 The time for debate on a privileged resolution disposing of an election contest may, by unanimous consent, be extended for additional time, with such time to be equally divided between a majority and a minority member of the Committee on Elections, with the previous question to be considered as ordered at the conclusion thereof.**

In the 1938 New Hampshire election contest of Roy v Jenks (§ 49.1, infra), a spokesman for the majority report on the election contest obtained unanimous consent for an extension of time to two and one-half hours for debate. The additional time was divided equally between the spokesman for the majority view and the spokesman for the minority view. The previous question was considered as ordered at the conclusion of debate. A motion to recommit the resolution was agreed to by the House.

***Disposal by Stipulation of Parties***

**§ 42.10 An election contest may be disposed of by way of dismissal pursuant to a stipulation of the parties to that effect.**

In Sullivan v Miller (§ 52.5, infra), a 1943 Missouri contest, the parties conducted their own recount of votes, which affirmed that contestee had received a majority of the votes cast. The parties then stipulated to the dismissal of the contest, which stipulation was communicated to the committee and set forth in its report recommending dismissal. The House agreed to the committee report.

***Disposal by Resolution Declaring Seat Vacant***

**§ 42.11 Declaring a vacancy in a seat is one of the options**

**available to the House of Representatives and is generally exercised when the House decides that the contestant, while he has failed to justify his claim to the seat, has succeeded in so impeaching the returns that the House believes that the only alternative available to determine the will of the electorate is to hold a new election.**

In the 1971 California election contest of Tunno v Veysey (§ 64.1, infra), the elections committee, construing the Federal Contested Elections Act [2 USC §§ 381 et seq.], stated that the relief sought by the contestant, that the seat be declared vacant, was not proper under the circumstances. The contestant was limited to claiming the seat in question and offering proof to substantiate that claim.

**§ 42.12 The House may, by resolution, declare two elections held to fill a vacancy in the House to be invalid, declare neither contestant entitled to a seat, and require the Speaker to inform the Governor of the existing vacancy.**

In the 1934 Kemp, Sanders investigation (§ 47.14, infra), arising from a Louisiana special election, the Speaker upheld the propriety of that clause in the resolution which required the Speaker to notify the Governor of Louisiana of the action taken by the House in declaring the seat vacant.

### *Demand for Division on Resolution Disposing of Contest*

**§ 42.13 The defeat of a substitute resolution declaring contestee to have been elected does not preclude a demand for a division of the question on a resolution declaring contestant entitled to a seat and declaring contestee not so entitled.**

In Kunz v Granata (§ 46.2, infra), a 1932 Illinois contest, a demand was made for a division of the question for purposes of the vote on a resolution, the first part of which declared the contestee to have been defeated and the second part of which declared the contestant to have been elected. This demand followed the defeat of a substitute resolution that declared the contestee to have been elected. A point of order was raised against the request for a division on the ground that the House had just voted on the "reverse of this proposition." The Speaker overruled the point of order and the question was divided.

**§ 42.14 A Member may demand a division of two propositions in a resolution disposing of an election contest, the first declaring contestee not entitled to a seat and the second declaring contestant so entitled.**

In the 1938 New Hampshire election contest of Roy v Jenks (§ 49.1, infra), following three hours of debate on the election committee report in which the contestee, a sitting Member, participated, the previous question was ordered and a Member demanded a division of two propositions in the resolution. Accordingly, on the first proposition the House voted that the contestee, the sitting Member, was not entitled to the seat and, on the second proposition, that the contestant was entitled to the seat.

### *Resolutions Admitting Neither Contestant to a Seat*

**§ 42.15 A resolution may take the form of a declaration that the prima facie as well as the final rights of the contestants be referred to a committee on elections, and, until such committee shall have reported and the House decided such questions, that neither contestant be admitted to a seat.**

In the 1934 Kemp, Sanders investigation (§ 47.14, infra), both parties presented certificates of election at the date of convening of the second session of the 73d (Congress. A Member from Louisiana thereupon offered a resolution from the floor that neither of the contestants be admitted to a seat until the elections committee reported and the House decided on the question. Ultimately, neither party was found to have been validly elected, and the House authorized the Speaker to notify the Governor of the vacancy.

**§ 42.16 A privileged resolution declaring contestant entitled to a seat in the House may be recommitted to the Committee on Elections with instructions that the committee obtain further testimony from voters who cast certain disputed ballots.**

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, the House adopted a motion to recommit with instructions a privileged resolution declaring a contestant entitled to a seat in the House. The instructions provided for the taking of additional evidence, and that either the whole committee or a subcommittee could investigate, administer oaths, and issue subpoenas.

### *Substitute Resolutions*

**§ 42.17 A resolution disposing of an election contest is privileged, and a Member may not offer a substitute therefore unless the Member controlling the time for debate yields for that purpose or unless the previous question is voted down.**

In the 1934 Illinois election contest of McAndrews v Britten (§ 47.12, infra), a Member, Homer C. Parker, of Georgia, sought unanimous consent that a resolution disposing of the election contest be considered after the close of business on the Speaker's table. The Speaker informed the Member that such a request was not necessary, as the resolution was privileged and could be called up at any time.

When the resolution was offered by Mr. Parker, another Member, Adolph J. Sabath, of Illinois, immediately sought recognition to offer a "substitute" for the resolution, but the Member refused to yield for that purpose and was recognized by the Speaker pro tempore for one hour. Mr. Sabath then asked for unanimous consent that his "substitute" be read for the information of the House, to which request Mr. Ralph R. Eltse, of California, objected. Mr. Parker then yielded a few minutes of his time to Mr. Sabath, who read the "substitute" resolution. The previous question was then ordered, and no further action was taken on Mr. Sabath's resolution.

**§ 42.18 The House has rejected a substitute resolution providing that the contest be recommitted to the Committee on House Administration with instructions (1) to allow contestant to inspect all ballots and other pertinent papers; and (2) to permit contestant to take additional testimony after such inspection.**

In the 1949 Michigan contested election of Stevens v Blackney (§ 55.3, infra), after the House had refused to allow a contestant a recount because contestant had failed to produce evidence overcoming the presumption that there had been a fair election, although a recount of only seven of the 207 precincts had reduced contestee's plurality from 1,217 votes to 784 votes. The House had under consideration a resolution seating the contestee, when the Member handling the resolution yielded for an amendment which would have sent the case back to the Committee on House Administration. The substitute resolution was rejected by voice vote and the

original resolution was then agreed to without debate and by voice vote, thus seating the contestee.

### *Failure to Take Action on Reported Resolutions*

**§ 42.19 There have been instances in which the House has failed to take action on resolutions reported from an elections committee declaring contestee entitled to his seat.**

In the 1940 Tennessee election contest of Neal v Kefauver (§ 50.1, infra), the election committee report disclosed that it had dismissed the contest because of the contestant's failure to take evidence, file briefs, and appear in person. At the same time the committee submitted the committee report it also reported a resolution to the House declaring the contestee to be entitled to the seat. The House did not take any action on the resolution during the 76th (Congress, however. The contestee was a returned Member of Congress, already sworn and in office.

**§ 42.20 There have been instances in which the House has not called up a resolution disposing of an election contest.**

In the 1934 Illinois election contest of Weber v Simpson (§ 47.16, infra), the committee report concluded that the contestant had failed to "overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee." The committee submitted a resolution that the contestee was entitled to his seat, but the resolution was not called up.

## § 43. Committee Reports

Under the House rules, until the 94th Congress, the Committee on House Administration was required to make a final report to the House in each contested election case.[16]

This report was to be made at such time "as the committee considers practicable in that Congress to which the contestee is elected."[17] Prior to the adoption of this language, the rule required submission of final reports not later than six months from the first day of the first regular session of the Congress. Such rules have been construed as directory rather than mandatory.[18]

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**16.** Rule XI clause 25, *House Rules and Manual* § 733 (1973).

**17.** *Id.*

**18.** *Id.* (notes).

### *In General; Form of Report*

**§ 43.1 The committee report may be summary in form, and may provide for the disposition of more than one contest in the same report.**

In Woodward v O'Brien (§ 54.6, infra), a 1947 Illinois contest, the Committee on House Administration disposed of the contest in a summary report which also provided for the disposition of two other cases. The report recited that no testimony in behalf of the contestant had been taken during the required period, and recommended that notices of intention to contest the elections be dismissed.

**§ 43.2 An elections committee report may summarily recommend that a contest be dismissed as lacking in merit.**

In Mankin v Davis (§ 54.2, infra), a 1947 Georgia election contest in which the contestant disputed the method by which the contestee had been nominated in the primary election, the committee report indicated that the committee had held full hearings in the contest, and had given consideration to the contestee's brief, which had been filed more than 30 days after reception of a copy of the contestant's brief, and the committee summarily recommended that the contest be dismissed "as lacking in merit." Accordingly, the contest was dismissed.

**§ 43.3 The Committee on House Administration has submitted a final report on an election contest brought by a defeated primary candidate although there was no record of transmittal of the contest to the committee.**

In the 1951 Georgia contested election of Lowe v Davis (§ 56.3, infra), there was no record of transmittal of the contest to the Committee on House Administration, nor did the House adopt a resolution referring the contest to the committee, but the committee nevertheless submitted a unanimous report indicating that the contestant, who had not been a candidate in the general election, had been defeated by the contestee in the primary election and that "the contestee had not been guilty of any acts in connection with that primary which would disqualify him for office."

### *Resolution Accompanying Report*

**§ 43.4 A member of an elections committee may submit**

**a report on an election contest from the floor for printing in the Record, and then immediately call up an accompanying privileged resolution relating to the contest by unanimous consent.**

In the 1943 Illinois election contest of Moreland v Schuetz (§ 52.3, infra), after submitting the election committee report that the contestant had not introduced sufficient evidence to warrant a complete recount, which he had requested, a Member on the election committee then by unanimous consent called up on the same day the resolution disposing of the contest.

The House agreed to the resolution.[19]

### *Timeliness of Report*

**§ 43.5 The rule that required the Committee on House Elections to submit their final reports within six months from the first day of the first regular session to which the contestee was elected was construed to be directory and not mandatory, so as not to prevent the consideration of an election contest reported after the six months had expired.**

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, a point of order was made against acceptance of a final report on an election contest by the House in that it was not timely, being in violation of former section 47 of Rule XI, which required the submission of such reports not later than six months from the first day of the first regular session of the Congress to which the contestee was elected. The Speaker overruled the point of order challenging the report, noting that a mandatory construction of that rule would be inconsistent with the constitutional right of the House to judge the election of its Members, and inconsistent with the statutory right of parties to collect testimony for a longer period.

**§ 43.6 The Speaker ruled that a point of order could not be directed against reception by the House of an elections committee report that was not presented to the House until after the period required for its submission had expired.**

As noted above, in Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, Speaker William B. Bankhead, of Alabama, overruled a point of order directed against

19. This procedure has been followed in almost every election contest.

the late filing of an elections committee report; an appeal from this decision was laid on the table by a roll call vote.

### *Minority Reports*

**§ 43.7 By unanimous consent, the minority views of an elections committee may be filed subsequent to the filing of the majority final report.**

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, the minority of the Committee on Elections was granted one week, by unanimous consent, to file its views.

**§ 43.8 The minority views of an election committee, though filed subsequent to the views of the majority, were by unanimous consent printed to accompany the views of the majority.**

In the 1932 Illinois election contest of Kunz v Granata (§ 46.2, infra), the report from the majority on the Committee of Elections No. 3 was submitted on Mar. 11, 1932, and the following day a member of the committee minority was given unanimous consent by the House to print the minority views to accompany the majority report.

**§ 43.9 Dissenting members of a subcommittee on elections have presented minority views and recommendations, together with a chronological chart of events, the rules of the Committee on Elections, and the laws governing contested elections.**

In the 1949 Michigan contested election of Stevens v Blackney (§ 55.3, infra), the minority report took strong exception to the actions of the subcommittee and filed a minority report citing precedents of the House, court decisions and federal statutes.

### *Effect of Contestant's Withdrawal or Abandonment of Contest*

**§ 43.10 The report of an elections committee may recite the fact that contestant had withdrawn his notice of contest, and may include a resolution recommending that contestee be held entitled to his seat.**

In Smith v Polk (§ 50.3, infra), a 1939 Ohio contest, a unanimous report of the Committee on Elections recited the fact that contestant had withdrawn the contest and recommended the following resolution:

> *Resolved*, That the Honorable James G. Polk was duly elected as Representative from the Sixth Congressional

District of the State of Ohio to the Seventy-sixth Congress and is entitled to his seat.

**§ 43.11 There have been instances in which an elections committee has failed to submit a final report, particularly in those cases where the House has been informed that the contestant has abandoned his contest.**

In the 1937 Tennessee contested election case of Rutherford v Taylor (§ 49.2, infra), the Clerk transmitted a letter to the Speaker advising that the contestant had initiated an election contest on Dec. 4, 1936, by serving notice on the contestee, a returned Member, and had taken testimony on Jan. 27, 29, and again on Apr. 27, 1937, but that no further testimony had been adduced. The Clerk advised in the letter that the contest had abated. The Speaker referred the letter, along with copies of the notice and answer, to the Committee on Elections No. 1 and ordered the materials printed as a House document.[20]

**§ 43.12 A report of a committee on elections, containing its recommendations as to the disposition of the contest, may include a transcript of contestant's letter of withdrawal.**

In the 1934 Mississippi election contest of Reese v Ellzey (§ 47.13, infra), the Committee on Elections report contained a letter from the contestant withdrawing from the contest, stating in part that "while so many matters of vital importance require the attention of the Congress, it would be unpatriotic on my part to attempt to occupy the time of Congress about a matter of such trivial importance to the welfare of our country."

***Failure of Committee to Submit Report***

**§ 43.13 There have been instances in which an elections committee did not submit a report and the House did not dispose of a contest in which testimony had been taken by the parties and forwarded pursuant to statute.**

In the 1934 Pennsylvania election contest of Felix v Muldowney (§ 47.7, infra), the Speaker laid before the House a letter from the Clerk transmitting the contest instituted by the contestant. That communication, containing also original testimony taken by the parties and other accompanying

20. See also LaGuardia v Lanzetta (§ 47.10, infra), a 1934 New York election contest.

papers, was referred to the Committee on Elections and ordered printed. The committee, however, did not submit a report relating to this election contest during the 73d Congress, and the House took no other action with respect to the contest.

**§ 43.14 There have been instances in which the report of the Subcommittee on Elections has been printed and adopted by the full Committee on House Administration, but no further action taken on the election contest.**

In the 1963 Minnesota election contest of Odegard v Olson (§ 60.1, infra), neither a resolution dismissing the contest or declaring the contestee entitled to his seat nor the report of the Subcommittee on Elections, was submitted by the Committee on House Administration to the House, although the full committee had adopted the subcommittee report finding that time for taking testimony had expired.

## § 44. Form of Resolutions

### *Form of Resolution Disposing of Contest*

**§ 44.1 In a resolution dismissing an election contest, the House struck language declaring the contestee to be entitled to the seat, as such language is inappropriate in a procedural matter.**

In the 1965 Mississippi election contest of Wheadon et al. v Abernethy et al. [The Five Mississippi Cases] (§ 61.2, infra), the House determined that the contestants who were not candidates in the official congressional election held in November 1964 (held under statutes which had not been set aside by a court of competent jurisdiction), lacked standing under the contested elections statute, 2 USC §§ 201 et seq. Accordingly, the House voted to dismiss the contests, based on its precedents. The resolution, however, further declared that the contestees, all sitting Members, were entitled to their seats. The resolution was amended to strike this language as inappropriate in a procedural matter.

**§ 44.2 For form of resolution declaring contestant incompetent to initiate an election contest and dismissing his notice of contest, and barring future consideration by the House of subsequent petitions or papers relating to the case, see Miller v Kirwan (§ 51.1, infra).**

### § 44.3 A single resolution may dispose of several contested elections.

In Roberts v Douglas (§ 54.4, infra), a 1947 California contest, without debate and by voice vote, the House agreed to a resolution disposing of three contested elections simultaneously on July 25, 1947. In none of the cases had any testimony been taken on behalf of the contestants within the time prescribed for taking of testimony.

In another instance in 1949, after the committee report recommended that three contested elections be dismissed on the grounds that no testimony had been received by the Clerk within the requisite time period, the house agreed without debate and on a voice vote to a resolution dismissing the contests simultaneously. See Browner v Cunningham (§ 55.1, infra), Fuller v Davies (§ 55.2, infra), and Thierry v Feighan (§ 55.4, infra).[21]

## § 45. Costs and Expenses; Compensation and Allowances

A witness whose deposition is taken under the Federal Contested Elections Act is entitled to receive the same fees and travel allowance paid to witnesses subpenaed to appear before the House of Representatives or its committees.[1]

The Committee on House Administration may allow to any party reimbursement, from the contingent fund of the House, for his reasonable expenses of the case, including reasonable attorney's fees. An application for such reimbursement should be accompanied by a detailed account of such expenses, together with supporting vouchers and receipts.[2]

Under the former Contested Elections Act, 2 USC § 226, no contestant or contestee was to be paid more than $2,000 for expenses in election contests. Payment of any sum under the former statute was subject to several conditions and obligations. No such limit, other than the term "reasonable expenses" is contained in the present statute, 2 USC § 396.

### *Payments From Contingent Fund*

### § 45.1 Where authorized by the House, the Committee on House Administration may

21. See also Michael v Smith, § 54.3, infra.

1. 2 USC § 389(b).
2. 2 USC § 396.

**make payments, even after the House adjourns, from the House contingent fund for its expenses incurred in its investigation of an election contest.**

In Wilson v Granger (§ 54.5, infra), a 1948 Illinois contest, following numerous extensions of time granted by the Committee on House Administration to the parties in an election contest, the House agreed to a resolution providing for payments, after adjournment, by the committee of a limited amount from the contingent fund, to cover the costs of employment of investigators, attorneys, and clerical, stenographic, and other assistants involved in the investigation.

**§ 45.2 The House may agree to a resolution providing for payment of expenses incurred by an elections committee, from the contingent fund of the House.**

In Roy v Jenks (§ 49.1, infra), a 1938 New Hampshire contest, a committee on elections having been directed to conduct an additional investigation in a contested election case, the House agreed to a resolution called up by unanimous consent by a member of the committee which provided for payment of its expenses from the contingent fund of the House.

***Payments From Treasury Authorized by Joint Resolution***

**§ 45.3 Congress may, by joint resolution, appropriate money from the Treasury to pay expenses incurred by the parties in an election contest.**

In Lanzetta v Marcantonio (§ 48.1, infra), a 1936 New York contest, on the final day of the second session of the 74th Congress, a House joint resolution was introduced from the floor which made appropriations for the payment of expenses incurred in an election contest for a seat in the House from New York. Payment was authorized to both contestant and contestee for expenses incurred, as audited and recommended by the Committee on Elections. The joint resolution was passed without debate and by voice vote.

***Payments to Candidates Involved in Election Dispute Investigation***

**§ 45.4 In an investigation of the right of two candidates for a seat in the House in a disputed election, the House has authorized by resolution the reimbursement of both candidates for mileage and expenses actually incurred**

**in connection with the investigation by the Committee on House Administration.**

In the 1961 Indiana investigation of the right of J. Edward Roush or George O. Chambers to a seat in the House (§ 59.1, infra), the committee report reasoned that "had the investigation . . . been an actual 'election contest,' both the contestant and the contestee would have been authorized reimbursement of those expenses actually incurred in connection with the investigation conducted by the committee"; hence the House resolved to reimburse both candidates.

### *Retroactive Payments*

**§ 45.5 When, in a disputed election, the right of a candidate to a seat in the House has been determined, the Member-elect may be retroactively given the compensation, mileage, allowances, and other emoluments of a Member from the time he would otherwise have been sworn, had not his right to the seat been investigated.**

In the 1961 Indiana investigation of the question of the right of J. Edward Roush or George O. Chambers to a seat (§ 59.1, infra), the House ultimately resolved that Roush was entitled to the seat and awarded him the compensation, mileage, and the like, of a Member from the time that the Congress had convened (when he would otherwise have taken the oath).

### *Reimbursement Request Where Contest Has Abated*

**§ 45.6 A request for reimbursement of legal expenses incurred in a contested election was submitted to the Clerk even though the contest had abated by reason of the contestant's failure to produce evidence in support of his case within the time required by law.**

In the 1937 Tennessee election contest of Rutherford v Taylor (§ 49.2, infra), the contestee claimed that he was entitled to reimbursement for legal expenses as permitted by 2 USC § 226.[3] Eventually the Clerk transmitted a letter to the Speaker notifying him that the contest had abated, but not before the contestant had served notice of the contest upon the contestee, who answered the notice. Also, some testimony was taken before the case abated. The

3. Now 2 USC § 396.

Committee on Elections never issued a final report on the case.

### *Payments Conditioned on Good Faith in Filing the Contest*

**§ 45.7 A contestant's petition for expenses may be denied by an elections committee on the ground that contestant did not display good faith in filing the contest and made no showing of probable cause for relief.**

In McEvoy v Peterson (§ 52.2, infra), a 1944 Georgia contest, an elections committee concluded that contestant had not filed the contest in good faith, and denied his petition for reimbursement of expenses, it appearing that he had not been a member of any registered political party in the state, his name had not been on any ballots' and he had not received any votes.

## M. SUMMARIES OF ELECTION CONTESTS, 1931–72

## § 46. Seventy-Second Congress, 1931–32

### § 46.1 Kent Coyle

In the general election held on Nov. 4, 1930, Everett Kent was a candidate on the Democratic ticket and William R. Coyle was a candidate on the Republican ticket for election as Representative in Congress from the 30th Congressional District of Pennsylvania. The election officials certified in the regular manner that in the election William R. Coyle received 28,503 votes and Everett Kent 27,621 votes. Thereupon the Governor of Pennsylvania, on Dec. 2, 1930, declared William R. Coyle elected, and on the same day issued his certificate of such election.

Citizens and residents of several election districts filed petitions with a state court alleging, upon information, that fraud was committed in the computation of the votes cast in said districts, and asking that a recount of the ballots therein be ordered and held pursuant to an act of the legislature which stated it to be the duty of the court, upon proper petition, to appoint a recount board and to sit with the same and supervise a recount of the ballots.

On Dec. 11, 1930, Mr. Kent caused notice of an election contest to be served upon Mr. Coyle, and answer thereto was served upon Mr. Kent on Jan. 9, 1931.

On Mar. 28, 1931, that being next to the last of the 40 days al-

lowed contestee to offer proof, and after notice, contestee came in and offered as proof in the contest the entire court proceedings had in the recount in the election districts mentioned above, including stenographers' notes of testimony, petitions, and orders. To this offer of proof contestant objected, and the objection was renewed and insisted upon in his brief and the argument before the elections committee.

On Apr. 4 and again on Apr. 8, 1931, which was within the 10 days allowed contestant for offering proof in rebuttal only, contestant, after notice, offered evidence as in rebuttal of that offered by contestee on Mar. 28, 1931, based upon the contention (1) that the court in broadening and prosecuting the inquiry as it did, exceeded its statutory authority, and (2) that the testimony was not taken before a person and in the manner prescribed by Congress.

The report (No. 1264) of the elections committee, submitted May 7, 1932, stated in part:

> The petitions asking for a recount of the vote in the districts in question contained a general allegation of fraud in the computation of the vote, and did not specify the congressional vote. As the names of all candidates for office in the State were printed on one ballot, the recount necessarily involved the vote for State and local officers as well as representative in Congress. How far a judge of the State court did or did not have a right to go in an investigation of the election of State and local officers is a matter with which this committee is not concerned. The committee does not approve the manner in which the congressional vote was investigated. . . . 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 the second place contestant seeks to benefit by the result of the recount. The testimony taken by him on the 4th and the 8th of April relates mostly to the result of the recount, upon which is based his chief contention. . . .
>
> As to the remarkable difference between the count and the recount of the ballots in the six districts in question, contestant contends that he was deprived in the count and return of many votes either by gross error or fraud of someone or more of the election officials in each of the districts. Contestee contends that the count and return

was bona fide and correct from each of said districts, but after the election and prior to the recount someone secured access to the ballots and changed the pencil markings on many of them.

[Election officials in the districts in question] were sworn and examined, as well as the custodians of the ballot boxes, handwriting experts, and all other persons who seemed likely to be able to throw any light upon the subject. The ballot boxes, the ballots themselves, and all other documentary evidence was examined. A recital of much of this evidence in this report, or a reference in detail to it, would accomplish no good purpose. The committee has carefully considered the record, as well as the briefs filed and the arguments made, and while it is unable to point out therefrom exactly what did take place, it is of opinion and holds that contestant has failed to sustain any of the allegations of his notice of contest.

The committee therefore recommends to the House the adoption of 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 above privileged resolution (H. Res. 234) was agreed to by voice vote and without debate.[4]

On July 16, 1932, Speaker John N. Garner, of Texas, laid before the House the following request:

> Mr. Coyle asks leave to withdraw from the files of the House the original records of the court of Carbon County, Pa., which are adduced in evidence and made a part of the printed testimony in the contested election case of Kent v. Coyle, Seventy-second Congress, said case having been decided by the House of Representatives, the return of said official court records having been requested by said court of Carbon County, Pa.

There was no objection to the request, upon assurances from the Speaker that "this will not in any way affect the ordinary rules concerning the withdrawal of papers."

*Note:* A syllabus for Kent v Coyle may be found herein at § 34.4 (evidence). See also § 7 (jurisdiction and powers of courts) and § 39 (inspection and recount of ballots).

### § 46.2 Kunz v Granata[5]

On Mar. 11, 1932, Mr. John H. Kerr, of North Carolina, submitted the report[6] of the majority from the Committee on Elections No. 3 in the election contest brought by Democrat Stanley H.

**4.** 75 CONG. REC. 11055, 72d Cong. 1st Sess., May 24, 1932.

**5.** Also reported in 6 Cannon's Precedents § 186.

**6.** H. Rept. No. 778, 75 CONG. REC. 5848, 5849, 72d Cong. 1st Sess.; H. Jour. 537, 538.

Kunz against Republican Peter C. Granata from the Eighth Congressional District of Illinois. The majority report was also signed by Mr. Butler B. Hare, of South Carolina, Mr. John McDuffie, of Alabama, Mr. Guinn Williams, of Texas, Mr. John E. Miller, of Arkansas, and Mr. Howard W. Smith, of Virginia. Thereupon, Mr. Carl R. Chindblom, of Illinois, obtained unanimous-consent permission[7] that the minority of that committee have until midnight, Mar. 14, 1932, to file their views. On Mar. 12, 1932, Mr. Charles L. Gifford, of Massachusetts, was granted unanimous-consent permission[8] to file the minority views, signed by himself and by Mr. Harry A. Estep, of Pennsylvania, with the majority report.

On Dec. 16, 1931, the Speaker[9] had laid before the House a communication[10] from the Clerk transmitting the contest. The communication and accompanying papers were referred to the Committee on Elections No. 3 and ordered printed (though not as House documents).

The certified returns of the election held Nov. 4, 1930, had given contestee 16,565 votes to 15,394 votes for contestant, a majority of 1,171 votes for contestee.

Contestant Kunz, having filed timely notice of contest, applied for appointment of a notary public within the Eighth Congressional District, pursuant to 2 USC § 206 (now 2 USC §§ 386–388), to obtain testimony in his behalf. The notary public "commissioner" thereupon served a subpena duces tecum upon election officials, requiring them to produce ballots and other materials pertinent to the election. This action necessitated the subsequent modification of two court orders by the court which had impounded the ballots for recount in certain municipal elections. A complete recount of all congressional ballots was then conducted by the board of election commissioners under supervision of contestant's notary public and in the presence of a notary appointed by contestee. Their return, submitted by contestant's notary public, gave contestant 16,345 votes to 15,057 votes for contestee, a majority of 1,288 votes for contestant.

The revised returns as reported by the contestant's appointed notary public were analyzed by the committee report as follows:

> The contestant was entitled to every "straight ticket" cast . . . [provided] his

**7.** 75 CONG. REC. 5848, 72d Cong. 1st Sess.; H. Jour. 537.

**8.** 75 CONG. REC. 5885, 72d Cong. 1st Sess.; H. Jour. 541.

**9.** John N. Garner (Tex.).

**10.** 75 CONG. REC. 652, 72d Cong. 1st Sess.; H. Jour. 157.

> name was thereon unmolested along with the other Democratic candidates. 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. [T]his 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 took exception to this conclusion, and questioned the correctness of the "pretended recount," noting that "a number of these so-called straight Democratic ballots were also marked for Granata, which, under the Illinois law, should have been counted for Mr. Granata." Decisions by the notary public with respect to spoiled and defective ballots were challenged by the minority, as was the absence of conclusive evidence regarding 6,458 votes counted for contestant and claimed to be fraudulent by contestee. The minority claimed that "the record will show that some disputed ballots were put in envelopes with the thought that they would be brought for the decision of the committee or the House. They were not brought to the committee or the House."

The committee majority found that "the ballots in this contest were preserved as provided by law and were kept under the supervision and control of . . . the clerk of the board of election commissioners, and that the ballot boxes were all opened under his supervision or the supervision of his deputies, and that after the same were counted they were placed back in the boxes as the law required and again put in the proper depository." The minority claimed that "the integrity of the ballots had not been preserved," as, rather than being forwarded to the House committee, ballot boxes were opened several at a time, improperly commingled and counted simultaneously at separate tables in such unruly manner as to prevent thorough supervision by the notary public.

The committee majority further found that contestee's counsel, who had also been retained as counsel for contestants in certain municipal elections, had procured the ballot impounding order [referred to above] and writ which prohibited contestant from proceeding with taking testimony during the statutory period (see 2 USC § 386). The committee concluded that the time during which the ballots were "in custodia legis" should not be considered within the statutory period in which the contestant was allowed to take

testimony. The majority also cited an agreement between counsel for both parties to this effect.

The minority, while admitting the existence of informal agreements between the parties regarding extension of time, cited Parillo v Kunz (6 Cannon's Precedents § 116) and Gartenstein v Sabath (6 Cannon's Precedents § 115) to support their contention that "evidence not having been taken in the time as required by statute, could not be considered, even though there were stipulations of the parties to the contrary."

The committee majority concluded that the notary public commissioner, designated by contestant to take testimony in his behalf, "was an officer and the representative of the Congress to take evidence in this contest" (citing *In re Lorley* (1890), 134 U.S. 372), and that in such capacity, and pursuant to statute, he could require the production of ballots as "papers" pertaining to an election ("the best evidence of the intention of the electors") and could recount such ballots in the presence of contestee's appointed notary public commissioner.

The minority contended that "there was no authority for the alleged recount," and that, under an opinion of the Illinois attorney general in Rinaker v Downing (2 Hinds' Precedents § 1070), the production of ballots could not be compelled under the statute. The minority noted that, in Rinaker, the House had rejected the majority committee report which had asserted the right of a notary public to conduct a recount of ballots. The minority also contended that no contested election case existed which held that "a notary public can conduct a recount where objection has been urged to such proceeding."

The minority conceded that a federal court, while considering contestee's motion for writ of prohibition, had held that ballots were "papers" within the meaning of the statute. They claimed, however, that the court did not hold that the notary public, having obtained the ballots, could conduct his own recount. Rather, the court had left that issue for the House to decide. To establish the invalidity of such recount by a notary public, the minority quoted the Committee on Elections report in Gartenstein v Sabath (6 Cannon's Precedents § 115):

> Your committee is of the opinion that the primary evidence of the votes cast for the candidates for Representative in the Congress of the United States in this district was the poll books and ballots themselves, and that the official count by the election officers should not be set aside by the tes-

timony of a witness who merely looked at the ballots and testified to the results.

Mr. Kerr called up as privileged House Resolution 186[11] on Apr. 5, 1932. By unanimous consent,[12] pursuant to the request of Mr. Kerr, debate on the resolution was extended to four hours, to be equally divided and controlled by himself and Mr. Gifford. In stating the question, the Speaker included as part of the request the ordering of the previous question at the conclusion of debate. Then, Mr. Kerr asked unanimous consent that Mr. Edward H. Campbell, of Iowa, be permitted to offer a substitute resolution at the conclusion of debate. Mr. Campbell explained that his "substitute" would embody a motion to recommit to the Committee on Elections for the purpose of conducting a recount of ballots. Reserving his right to object, Mr. Gifford stated that the minority would offer as a substitute their recommendation that contestee be declared entitled to his seat. He thought that Mr. Campbell's motion might preclude such motion. Then, in response to a parliamentary inquiry, the Speaker stated that the House, having agreed to order the previous question at the conclusion of debate, had precluded the offering of either proposed motion. Therefore, the Chair restated the unanimous-consent request to include the ordering of the previous question on the motion to recommit and on the majority and minority resolutions.[13]

In debate, Mr. Kerr emphasized that the recount of ballots had been made in the presence of contestee and a notary public appointed by him. While denying that in every contest a recount would be justified by an allegation that a contestant "ran behind his ticket," Mr. Kerr contended that a recount was justifiable where, as here, contestant received "1,284 votes less than the other Democratic candidates in 11 precincts."

Mr. Gifford centered his contentions in debate upon the question of the integrity of the ballots, claiming that ballots are not the "best evidence . . . when any opportunity has been given to let them be tampered with." Mr. John C. Schafer, of Wisconsin, upon being informed that the notary public for contestant had not transmitted the ballots to the Committee on Elections, questioned the efficacy of the majority finding that ballots were "papers"

**11.** 75 CONG. REC. 7491, 72d Cong. 1st Sess.; H. Jour. 641, 642.

**12.** 75 CONG. REC. 7491, 72d Cong. 1st Sess.

**13.** *Id.* at p. 7492.

which in an election contest are required by the statute to be transmitted to the House.

Mr. Kerr, in response to Mr. Frederick W. Dallinger, of Massachusetts, distinguished Gartenstein as, in that case, the House had decided that a similar recount conducted by contestant's notary public was irregular because "only half of the votes had been recounted and therefore they could not tell who was elected." Mr. Dallinger replied that, in the present contest as well, contestee's counsel had repeatedly objected to the recount because "from 100 to 600 ballots were found to be missing out of various ballot boxes." Mr. Gifford yielded for debate to the contestee (Mr. Granata), the sitting Member, who contended that under state law, the many ballots which had been marked "straight Democratic" and had also been marked for him should have been considered votes for him.

The Speaker pro tempore ruled that the side supporting seating of the contestant, rather than the Member intending to offer a motion to recommit, was entitled to close debate.

After all time had expired, Mr. Campbell, of Iowa, offered the following resolution:[14]

> *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.

On demand of Mr. Campbell, the yeas and nays were ordered, and the motion was rejected by 178 yeas to 186 nays, with 4 "present." Thereupon, Mr. Gifford offered the following substitute[15] for the resolution:

> 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 demand of Mr. Gifford, the yeas and nays were ordered and the substitute was rejected by 170 yeas to 189 nays, with 5 "present."

Mr. Estep demanded a division of the question for a vote on the resolution (H. Res. 186), the first part of which stated:

> *Resolved*, That Peter C. Granata was not elected as Representative in the

**14.** 75 CONG. REC. 7514, 72d Cong. 1st Sess.; H. Jour. 641.

**15.** 75 CONG. REC. 7515, 72d Cong. 1st Sess.; H. Jour. 642.

> Seventy-second Congress from the eighth congressional district in the State of Illinois and is not entitled to the seat as such Representative.

Mr. Thomas L. Blanton, of Texas, made a point of order against the request for a division, claiming that the House had just voted on the "reverse of this proposition." The Speaker overruled the point of order under the precedents of the House. On a division vote, the first part of the resolution was agreed to, 190 ayes to 168 noes.

The second part of the resolution stated:

> *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.

Such portion of the resolution was agreed to by voice vote.

Thereupon, Mr. Kunz appeared at the bar of the House and took the oath of office.

*Note:* Syllabi for Kunz v Granata may be found herein at § 27.8 (extension of time for taking testimony); § 29.2 (ballots as "papers" required to be produced); § 37.7 (interpretations of "straight ticket" votes); § 37.19 (integrity of ballots); § 42.1 (disposal of contest by House resolution); § § 42.7, 42.8 (participation by parties and debate on resolution disposing of contests); § 42.13 (demand for division on resolution disposing of contest); § 43.8 (minority reports).

### § 46.3 O'Connor v Disney

In the contested election case of O'Connor v Disney, the contestant, Charles O'Connor, was the Republican candidate and the contestee, Wesley E. Disney, was the Democratic candidate for Representative in Congress from the First Congressional District of Oklahoma at an election held Nov. 4, 1930. In accordance with the official count and canvass of the election returns by the county election boards certified to the state election board in accordance with law, and in turn canvassed by such board, the state election board found and certified that the contestant O'Connor received 41,642 votes and the contestee Disney received 41,902 votes, and certified that the contestee was elected Representative by a majority of 260 votes. Accordingly, a certificate of election was duly issued by the said board to the contestee on Nov. 15, 1930.

The contestant alleged that in two of the ten counties in the district there had been fraudulent or irregular miscounts of ballots which had deprived him of 862 votes. The contestee in his answer denied such allegations and con-

tended that ballot boxes in those counties had been left unprotected and had afforded such opportunity for tampering that any change indicated by a recount would be the result of such tampering.

The report in favor of contestee was submitted by Mr. Joseph A. Gavagan of New York, for the Committee on Elections No. 2 on May 11, 1932 (Rept. No. 1288). The report stated that the committee, in considering the evidence in the case, had been guided by the following principles:

> 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.

In the view of the committee, the testimony conclusively established that the precinct boards were properly instructed as to the election law of Oklahoma with respect to the manner and method of counting ballots and, in particular, split ballots; and that in instances wherein questions arose as to split ballots, a 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 committee was thereby convinced that all ballots were duly and properly counted, and concluded that the contestant had failed to sustain the burden of proof of any mistake in the method of counting the ballots.

With respect to the care and preservation of the ballots, the committee noted the following circumstances:

> The evidence established that each election precinct board at the close of the election placed the paper ballots in folders together with a tally sheet of the votes cast, which, in turn, were placed in wooden boxes, and sent the boxes to the office of the county election board located in a combination hotel and office building; part of the offices were used as a real estate and insurance office by the witness Lloyd La Motte, then secretary of the county election board. Each ballot box was placed upon a shelf, and in some instances the keys opening the locks thereon were left dangling from the boxes, and in other instances the keys were kept in an unlocked drawer. The testimony of the witness La Motte and the witness Corkins . . . is to the effect that several persons had keys to the outside office of the place where

the ballot boxes were kept, and the witness La Motte testified to the fact that rumors of tampering with the ballot boxes were prevalent on the streets for a period of days after the election. This condition of easy access to the ballots continued for a period of nine days after the election, before they were removed to a place of safety and preservation.

The committee quoted the following language from the opinion in People v Livingston:[16]

> 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 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.

The majority of the committee concluded as follows:

> 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 in the genera] election held in November, 1930, in Ottawa County of the first congressional district of Oklahoma; 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. 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. [H. Res. 233]:
>
> > *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.

In additional views, Mr. John C. Schafer, of Wisconsin, supported the seating of contestee but contended that if the House were to be guided by Kunz v Granata (see § 46.2, supra), the then most recent precedent regarding the validity of a recount, the recount should be granted.

The privileged resolution (H. Res. 233) was agreed to by voice vote after extended debate.[17]

**16.** 79 N.Y. 279.

**17.** 75 CONG. REC. 11050, 72d Cong. 1st Sess., May 24, 1932.

*Note:* Syllabi for O'Connor v Disney may be found herein at § 35.10 (evidence necessary to compel examination of ballots); § 37.20 (preservation of ballots); and § 40.8 (burden of proving fraud sufficient to change election result).

## § 47. Seventy-third Congress, 1933–34

### § 47.1 Bowles v Dingell

On Feb. 9, 1934, Mr. John H. Kerr, of North Carolina, submitted the report[18] of the Committee on Elections No. 3, in the election contest of Charles Bowles against John D. Dingell, from the 15th Congressional District of Michigan, in the 73d Congress. On May 12, 1933, the Speaker[19] had laid before the House a letter[20] from the Clerk transmitting a "petition and accompanying letter" relating to the election of Nov. 8, 1932. The communication and accompanying papers were referred to the Committee on Elections No. 3 but not ordered printed.

The summary report related that "there was no notice of contest ever filed in said matter, as provided by law," and dismissed the case. The report accompanied House Resolution 260,[21] which Mr. Kerr offered from the floor as privileged on Feb. 24, 1934. The resolution was agreed to by the House by voice vote and without debate. It provided:

> *Resolved,* That Charles Bowles is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Fifteenth Congressional District of the State of Michigan; and be it further
>
> *Resolved,* That John D. Dingell is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Fifteenth Congressional District of the State of Michigan.

*Note:* Syllabi for Bowles v Dingell may be found herein at § 20.1 (necessity for filing notice of contest).

### § 47.2 Brewster v Utterback

During the organization of the House of Representatives of the 73d Congress on Mar. 9, 1933, Mr. Bertrand H. Snell, of New York, objected to the oath being administered to the Member-elect, John G. Utterback, from the Third Congressional District of Maine. Mr. Utterback (contestee) was then asked by the Speaker,[22] under

18. H. Rept. No. 695, 78 CONG. REC. 2282, 2292, 73d Cong. 2d Sess.; H. Jour. 153.
19. Henry T. Rainey (Ill.).
20. 77 CONG. REC. 3344, 73d Cong. 1st Sess.; H. Jour. 255.
21. 78 CONG. REC. 3165 73d Cong. 2d Sess.; H. Jour. 202.
22. Henry T. Rainey (Ill.).

the precedents, to stand aside while other Members-elect and Delegates-elect were sworn. Thereafter, Mr. Edward C. Moran, Jr., of Maine, offered from the floor as privileged House Resolution 5,[1] which stated:

> *Resolved,* That the Speaker is hereby authorized and directed to administer the oath of office to the gentleman from Maine, Mr. John G. Utterback.
>
> *Resolved,* That Ralph O. Brewster shall be entitled to contest the seat of John G. Utterback under the provisions of chapter 7, title 2, United States Code, notwithstanding the expiration of the time fixed for bringing such contests, provided that notice of said contest shall be filed within 60 days after the adoption of this resolution.

In response to the parliamentary inquiry propounded by Mr. Joseph W. Byrns, of Tennessee, the Speaker stated that under the general parliamentary law, the rules of the House not having been adopted, Mr. Moran was entitled to recognition for one hour on the resolution. Mr. Moran thereupon was granted unanimous-consent permission that time on the resolution be limited to 20 minutes, to be equally divided and controlled by himself and Mr. Snell, and that he be permitted to yield to Mr. Snell for the purpose of offering a substitute to the resolution.

Mr. Moran related that the state canvassing board, consisting of the Governor and a seven-man council and responsible for certifying the election results, were divided four to four on the question of certification of contestee's election and that contestee (Mr. Utterback) did not possess a certificate signed by the Governor. Mr. Moran contended that the Third Congressional District of Maine was entitled to representation pending contestant's bringing of the contest as permitted by his resolution.

Mr. Snell then offered his substitute resolution[2] which provided:

> *Resolved,* That the papers in possession of the Clerk of the House in the case of the contested election from the third district of Maine, be referred to the Committee on Elections No. 1, with instructions to report on the earliest day practicable who of the contesting parties is entitled to be sworn in as sitting Member of the House.

Mr. Snell contended that the House should not recognize the prima facie right of contestee to a seat by permitting him to take the oath absent a certificate of election required by the House and by

**1.** 77 CONG. REC. 71, 73d Cong. 1st Sess.; H. Jour. 6.

**2.** 77 CONG. REC. 72, 73d Cong. 1st Sess.; H. Jour. 6.

the laws of Maine. Mr. John W. McCormack, of Massachusetts, cited several precedents wherein the House had permitted Members-elect to take the oath of office "when the House was satisfied that the man was elected." Mr. Snell claimed that the election was still in dispute. Upon his demand, the yeas and nays were ordered on his substitute, which was defeated by 105 yeas to 296 nays. The resolution seating Mr. Utterback was thereupon agreed to by voice vote, after which he appeared at the bar of the House and took the oath of office, confirming the seating of the contestee.

The report of the Committee on Elections No.. 3 was submitted by Mr. Clark W. Thompson, of Texas, on May 22, 1934. Minority views of Mr. Randolph Perkins, of New Jersey, accompanied the report. (On Mar. 6, 1934, the Speaker had laid before the House a letter [3] from the Clerk transmitting the contest, original testimony and other papers, and had referred it to the committee.)

The report related that in the "regular state election" held on Sept. 12, 1932, contestee (Utterback) had received 34,520 votes to 34,226 votes for contestant and 213 votes for one Carl S. Godfrey, a plurality of 294 votes for contestee. Contestant alleged that in 16 of the voting precincts comprising the district, the fraudulent or negligent failure of election officials to perform their duties as required by state law was sufficient to void all votes cast in those precincts and therefore to establish a remaining plurality of votes for contestant. From the minority views of Mr. Perkins, it appears that contestant was claiming that election officials had neglected to provide voting booths in those precincts, that in other precincts ballots contained identical markings made by the same hand, that in another more ballots had been cast than there were voters, and that in yet another precinct officials had illegally permitted and assisted unqualified voters to cast ballots.

The committee report accepted as binding an advisory opinion of the Supreme Court of Maine rendered to the Governor and his executive council. That opinion advised that in two of the 16 contested precincts ballots should be discounted for failure of election officials to perform certain duties made mandatory by state law. The committee, assuming the validity of that opinion, found that contestee's plurality would then

**3.** 78 CONG. REC. 3874, 73d Cong. 2d Sess.; H. Jour. 237.

be reduced to 74. The committee then made the further assumption that "the advisory board did not think that there was sufficient evidence to disturb the returns from the other 14 precincts complained of by the contestant." As to those 14 precincts, the committee determined "that there was not sufficient evidence of legal fraud or intentional corruptness to justify the committee to recount the ballots of those precincts or to justify the committee in sustaining the contestant's contentions."

Contestant evidently abandoned his allegations of fraud during the committee hearings, and relied upon proof of negligence and irregularities by officials to support his contest. On these grounds, the committee summarily sustained the court advisory opinion and refused to "disfranchise the voters in the 16 precincts . . . because of some alleged breach of official duty of the election officers."

Mr. Perkins contended "that the provisions of voting booths as required by state law is a mandatory requirement and that in their absence the vote must be rejected" [citing *In re Opinions of the Justices,* 124 Me. 474, 126 A. 354 (1924)]. In one precinct where voting booths were not employed, he cited as "undisputed" that 159 of 163 votes for contestee had been marked by a single election official. Citing Yost v Tucker (2 Hinds' Precedents § 1078), Mr. Perkins argued that the House should follow a state court interpretation that a particular state law is a mandatory requirement. Mr. Perkins further contended that there was much corroborative evidence in support of contestant's particular allegations.

Mr. Thompson called up House Resolution 390 [4] as privileged on May 28, 1934. The resolution, which was agreed to by voice vote and without debate, provided:

> *Resolved,* That Ralph O. Brewster is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Third Congressional District of the State of Maine; and further
>
> *Resolved,* That John G. Utterback is entitled to a seat in the House of Representatives in the Seventy-third Congress from the Third Congressional District of the State of Maine.

*Note:* Syllabi for Brewster v Utterback may be found herein at § 4.2 (House power over administration of oath to candidate in election contests); § 5.14 (advisory opinions on state law); § 9.2 (certificates of election); § 10.13 (violations and errors by officials as

**4.** 78 CONG. REC. 9760, 73d Cong. 2d Sess.; H. Jour. 587.

grounds for contest); § 20.2 (notice of contest filed late); § 38.1 (voter intention as paramount concern in interpreting ballot).

### § 47.3 Casey v Turpin

Mr. John H. Kerr, of North Carolina, submitted the report[5] of the Committee on Elections No. 3 on Mar. 12, 1934, in the election contest of John J. Casey against C. Murray Turpin from the 12th Congressional District of Pennsylvania. On Jan. 5, 1934, the Speaker[6] had laid before the House a letter[7] from the Clerk transmitting a copy of the notice of contest and reply with the statement that no testimony had been received within the time prescribed by law and that the contest apparently had abated. The Speaker had referred that communication to the Committee on Elections No. 3.

On Feb. 2, 1934, the Speaker laid before the House a letter[8] from the Clerk transmitting a letter from contestant which stated that the commissioner before whom testimony had been taken in his behalf "has failed to forward this testimony to the Clerk of the House of Representatives in accordance with law, and notwithstanding attempts to have her comply with the provisions of this statute, she has, up to the present date, failed to do so." Contestant requested the Clerk or the House to require the production of such testimony. The Clerk's communication, together with the contestant's request, was referred to the Committee on Elections No. 3 and ordered printed as a House document.

The committee report stated that "there was no evidence before the committee of the matters charged in his notice of contest, and no briefs filed, as provided by law." The committee dismissed the contest for lack of such evidence and for failure of contestant to appear in person to show cause why his contest should not be dismissed.

The committee report accompanied House Resolution 345,[9] which Mr. Kerr called up as privileged on Apr. 20, 1934. Mr. Kerr immediately moved the previous question, and the resolution was agreed to by voice vote and without debate. House Resolution 345 provided:

> *Resolved*, That John J. Casey is not entitled to a seat in the House of Rep-

5. H. Rept. No. 930, 78 CONG. REC. 4359, 4360, 73d Cong. 2d Sess.; H. Jour. 252.
6. Henry T. Rainey (Ill.).
7. 78 CONG. REC. 137, 73d Cong. 2d Sess.; H. Jour. 28.
8. H. Doc. No. 237, 78 CONG. REC. 1854, 73d Cong. 2d Sess.; H. Jour. 123.
9. 78 CONG. REC. 7082, 73d Cong. 2d Sess.; H. Jour. 424.

resentatives of the Seventy-third Congress from the Twelfth Congressional District of the State of Pennsylvania.

*Resolved,* That C. Murray Turpin is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Twelfth Congressional District of the State of Pennsylvania.

*Note:* Syllabi for Casey v Turpin may be found herein at § 15.1 (failure to take testimony within prescribed time); § 29.1 (failure to produce testimony); § 33.1 (cause for dismissal); § 33.2 (order to appear).

### § 47.4 Chandler v Burnham

Mr. Joseph A. Gavagan, of New York, submitted the report[10] of the Committee on Elections No. 2 on Apr. 19, 1934, in the election contest brought by Claude Chandler against George Burnham from the 20th Congressional District of California. The Speaker[11] had referred the contest to that committee on Jan. 16, 1934, on which date he had laid before the House a letter[12] from the Clerk transmitting the contest, original testimony, and relevant papers.

In the election for Representative held Nov. 8, 1932, the official returns gave a plurality of 518 votes to contestee from a total of 87,061 votes cast.

Contestant served timely notice of contest on Dec. 19, 1932, alleging that "he had received a majority of all the lawful votes cast"; that election officials had rejected "void, spoiled, mutilated, or marked" ballots cast for him; that there were deviations in the number of ballots delivered to and the number accounted for in some of the precincts; that many used ballots were unaccountably missing from the ballot boxes; and "that by reason of frauds, irregularities, and substantial errors, many votes counted for the contestee should have been counted for the contestant." The committee, while not dismissing the contest for failure of contestant to state with particularity the basis of his contest and the names and frauds alleged, stated that contestant's notice of contest had been insufficient in this respect and would under other circumstances be grounds for sustaining contestee's motion to dismiss.

In testimony and in his brief before the Committee on Elections No. 2, contestant alleged that in 14 precincts the combination of violations of election laws by officials through illegal counting, invalid compositions of election

**10.** H. Rept. No. 1278, 78 CONG. REC. 6971, 73d Cong. 2d Sess.; H. Jour. 419.

**11.** Henry T. Rainey (Ill.).

**12.** 78 CONG. REC. 760, 73d Cong. 2d Sess.; H. Jour. 64.

boards, unsworn officials, and unattested tally sheets and the condition of ballots and envelopes containing ballots should "warrant the rejection of the returns in total."

The committee determined that contestant "failed to establish fraud, deceit, conspiracy, or connivance on the part of the contestee or any election board, official clerk, or employee." In arriving at this determination, the committee was guided by the following postulates:

1. The official returns are prima facie evidence of the legality and correctness of official action.
2. That election officials are presumed to have legally performed their duties.
3. That the burden of coming forward with evidence to meet or resist these presumptions rests with the contestant.
4. That fraud is never presumed, but must be proven.
5. That the mere closeness of the result of an election raises no presumption of fraud, irregularities, or dishonesty.

The committee considered the distinction between "mandatory" election laws, which confer the right of suffrage by voiding an election unless certain procedures are followed, and "directory" statutes, which fix penalties for violation of procedural safeguards but do not void an election for noncompliance. The committee determined that contestant had alleged violations of "directory" statutes, "a departure from which will not vitiate an election, if the irregularities do not deprive any legal voter of his vote, or admit an illegal vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive benefit from them." The committee, while recognizing its power to reject entire groups of ballots as requested by contestant, stated that such power would only be exercised "where it is impossible to ascertain with reasonable certainty the true vote."

Specifically, the committee rejected contestant's claim that ballots in five precincts should be voided because election boards and precinct officials had not been sworn, finding that all such officials, other than inspectors, had subscribed to the required oath, and citing cases in support of the rule that an election will not be invalidated based on such failure, the acts of election officials acting under color of office being binding.

Contestant alleged "that by reason of a recount of approximately one third of the ballots cast" he had been elected. State law did not provide machinery for conducting a recount. Contestant

claimed that during the taking of testimony under subpena, at which the ballots cast had been examined in the presence of both parties and their counsel, he had kept a tally of votes cast, including the very ballots he was declaring to be "marked, mutilated, or identified, and void, irregular, or otherwise improper ballots," and that this tally was sufficient to overcome contestee's plurality. As contestee had not known that contestant was conducting such tally, and was not given the opportunity to identify the ballots tallied, the committee ruled that "the testimony of the contestant in this respect is uncorroborated and constitutes a self-serving declaration wholly inadmissible in evidence and of no legal probative value." The committee therefore ruled out evidence concerning the tally, as well as the tally itself.

The report commented that contestant had made contradictory allegations on the one hand that an examination of the ballots as shown by his tally indicated that he had been elected, on the other hand "that the ballots were not preserved and returned in the manner required by law." The committee ruled that "these dual contentions cannot be maintained . . . they cannot be asserted legal for one purpose and illegal for another."

On May 15, 1934, Mr. Gavagan called up as privileged House Resolution 386 [13] which was agreed to by voice vote and without debate, and which provided:

> *Resolved*, That George Burnham was elected a Representative in the Seventy-third Congress from the Twentieth Congressional District of California and is entitled to a seat as such Representative.

*Note:* Syllabi for Chandler v Burnham may be found herein at § 5.11 (election committee's power to examine and recount disputed ballots); § 10.10 (distinctions between mandatory and directory state laws); § 10.14 (violations and errors by officials); § 22.2 (failure to state grounds with particularity); § 36.4 (official returns as presumptively correct); § 36.11 (effective closeness of result); § 37.21 (ballot tallies); § 42.5 (resolution disposing of contest as privileged).

### § 47.5 In re Ellenbogen

On Mar. 11, 1933, the Speaker [14] laid before the House a letter [15] from the Clerk transmitting a memorial and accompanying papers filed by Harry E. Estep (a former Representative),

**13.** 78 CONG. REC. 8921, 73d Cong. 2d Sess.; H. Jour. 543.

**14.** Henry T. Rainey (Ill.).

**15.** 77 CONG. REC. 239, 73d Cong. 1st Sess., H. Jour. 66.

challenging the citizenship qualifications of Henry Ellenbogen, a Representative-elect from the 33d Congressional District of Pennsylvania. That communication and accompanying papers were referred to the Committee on Elections No. 2 (not ordered printed).

The signed report[16] of the Committee on Elections No. 2, to accompany House Resolution 370, was submitted by Mr. Joseph A. Gavagan, of New York, on May 1, 1934. The report related the following undisputed facts:

1. That Mr. Ellenbogen (respondent), was born in Vienna, Austria on Apr. 3, 1900, declared his intention to become a United States citizen on May 19, 1921, and was admitted to citizenship on June 17, 1926;

2. That respondent was elected a Representative on Nov. 8, 1932, at that time being a citizen for six years, five months;

3. That upon commencement of the first session of the 73d Congress (convened by Presidential proclamation) on Mar. 9, 1933, respondent had been a citizen for six years, eight and one-half months and did not take the oath of office;

4. That upon commencement of the second session of the 73d Congress on Jan. 3, 1934, respondent, then a citizen for seven and one-half years, took the oath of office;

5. That on Dec. 3, 1933, the date specified by article I, section 4, clause 2 of the Constitution for convening of the 73d Congress (which provision had not been superseded by the 20th amendment on the date of respondent's election) respondent would have been a citizen for seven years, five months.

Article I, section 2, clause 2 of the Constitution provides:

> No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

The committee determined the central issue to be "as of what date is the seven year citizenship qualification for Representative provided for in section 2 above, to be determined?" Of particular interest was whether the Constitution requires seven years' citizenship prior to election, prior to the date on which the term commences, or prior to the time when the Member-elect is sworn. As the committee could not base its decision on an exact case in point, the committee resorted to "rules of constitutional and statutory construction, constitutional history,

**16.** H. Rept. No. 1431, 78 CONG. REC. 7873, 7876, 73d Cong. 2d Sess.; H. Jour. 479.

the rules of syntax, and prior interpretations of related but not identical sections of the Constitution."

Employing first a syntax analysis, the committee determined that the words "when elected" in the second clause of section 2 modified the word "person" in the first clause only with respect to the subject of the second clause, i.e., habitancy, and that such words had no relation to the words "shall not have" and "been" in the first clause.

Examining next the history of section 2 at the Constitutional Convention and citing two preliminary drafts submitted at the convention, the committee concluded that "the intent of the framers (was) to require only habitancy 'when elected', the present section 2 leaving out 'before the election' from the citizenship [requirement] in the second draft." The committee studied the reasons expressed in the debates at the convention for each of the three qualifications in section 2, concluding that the age and citizenship qualifications could only reasonably apply to Members (to assure maturity and loyalty), "hence dates of elections need not be controlling."

Asserting that the age and citizenship requirements of section 2 were inserted with similar intent by the convention, the committee proceeded to cite precedents construing the age requirement for Representatives or Senators as demanding attainment of the required age when sworn and not when elected or at the commencement of term. The committee then construed section 2 itself as distinguishing between Representatives-elect in the second clause and Representatives who must in addition meet the qualifications of the first clause, and cited Hammond v Herrick (1 Hinds' Precedents § 499) for the proposition that election does not, of itself, constitute membership, "although the period may have arrived at which the congressional term commences." As well, the committee reasoned that constitutional language requiring Congress to assemble the first Monday of December unless they by law appointed a different day indicated that the framers did not intend that age and citizenship requirements must be met at a fixed time.

The committee drew a further analogy from article I, section 6 of the Constitution, which prohibits a Member of Congress from "holding any office under the United States." The report extensively cited Hammond v Herrick, in

which the House had construed that provision to require Members of Congress to divest themselves of incompatible offices before they are sworn, as foreseen dangers of executive control "could materialize only in a Member." The committee report in the Hammond v Herrick memorial matter stated:

> . . . Neither do election and return create membership. These acts are nothing more than the designation of the individual, who, when called upon in the manner prescribed by law, shall be authorized to claim title to a seat. This designation, however, does not confer a perfect right; for a person may be selected by the people, destitute of certain qualifications, without which he cannot be admitted to a seat.

The Committee report concluded:

> [A] plain reading of section 2 of the Constitution of the United States, the historical background of the section as exemplified by the debates in the Constitutional Convention, the objects sought to be accomplished by the requirements of the section, and the decisions of the committees of this House in analogous cases all compel an interpretation of the citizenship qualification of section 2 as to require 7 years of citizenship at the time when the person presents himself to take the oath of office.

On June 16, 1934 (legislative day of June 15), Mr. Gavagan called up House Resolution 370 (17) as privileged. The resolution, which was agreed to by voice vote and without debate, declared:

> *Resolved,* That when Henry Ellenbogen, on January 3, 1934, took the oath of office as a Representative from the Thirty-third Congressional District of the State of Pennsylvania, he was duly qualified to take such oath; and be it further
>
> *Resolved,* That said Henry Ellenbogen was duly elected as a Representative from the Thirty-third District of Pennsylvania, and is entitled to retain his seat.

*Note:* Syllabi for In re Ellenbogen may be found herein at § 6.5 (items transmitted by Clerk); § 9.4 (citizenship); § 17.3 (alternatives to statutory election contests).

### § 47.6 Ellis v Thurston

The report (18) of the Committee on Elections No. 1 was submitted by Mr. Homer C. Parker, of Georgia, on Apr. 23, 1934, in the election contest brought by Lloyd Ellis against Lloyd Thurston from the Fifth Congressional District of Iowa. The contest had been referred to that committee on Feb. 19, 1934, on which date the Speaker (19) had laid before the House a letter (20) from the Clerk

17. 78 CONG. REC. 12193, 73d Cong. 2d Sess.; H. Jour. 818.

18. H. Rept. No. 1305, 78 CONG REC. 7186, 7190, 73d Cong. 2d Sess.; H. Jour. 431.

19. Henry T. Rainey (Ill.).

20. 78 CONG. REC. 2769, 73d Cong. 2d Sess.: H. Jour. 178.

transmitting the contest, original testimony and accompanying papers. The Clerk's communication had been ordered printed (not designated as a House document).

The official returns gave contestee 51,909 votes to 51,732 votes for contestant, a majority of 177 votes for contestee. On Jan. 26, 1933, the parties to the contest agreed in writing to conduct a complete recount of votes, which showed contestant to have received 50,715 votes and contestee to have received 51,334 votes, a majority of 619 votes for contestee. The report stated that an additional 4,821 "disputed" votes "were not counted by the election judges for either contestant or contestee" and that 4,339 votes "were conceded to be no vote for either contestant or contestee."

Issues and findings of the 4,821 disputed ballots, contestant conceded that 1,575 ballots had been properly voided by election judges as not having been cast in conformity with state law, but contended that "the voters intended 1,000 of these ballots to be for Mr. Ellis and 575 for contestee, and should be included in the count." The committee report, assuming the validity of contestant's argument, found that contestee would retain a 194-vote majority.

The report then considered the remaining 3,246 disputed votes in three categories. In his brief, contestant claimed that on 321 ballots which had been cast only for Presidential and Vice Presidential candidates, 250 had been cast for his party nominee and 71 for contestee's party nominee. Assuming that the parties should be respectively credited with such votes, the committee found contestee's majority to be 15 votes.

Again considering the figures given by contestant in his brief, the report cited 142 ballots marked for Presidential and Vice Presidential candidates of contestant's (Democratic) party and marked for candidates of the Republican party for other offices, but not marked for the office of Representative, as well as 13 ballots marked in contrary manner for the Presidential candidate of contestee's (Republican) party, with splits for certain Democratic candidates, but not marked for Representative. Finally, the report cited contestant's figures that of the remaining 2,770 disputed ballots, 2,164 had been marked for contestant's party candidate for President and Vice President and also marked for candidates of both parties for other offices, but not marked for Representative. By claiming all the ballots that were cast for the Presidential nominee

of his party, but which indicated no choice for Representative, and by claiming 1,000 of the 1,575 ballots found void under state law, contestant urged in his brief that he was entitled to the seat from the Fifth Congressional District of Iowa.

The report quoted the pertinent sections of Iowa law prescribing the manner of voting, and then concluded that "the figures given by the contestant in his brief do not warrant a decision in his favor." The committee ruled that voters in marking the squares opposite the Presidential and Vice Presidential candidates did not intend to vote a straight-party ticket, as the statute provided that a cross be placed in a separate party circle in order to cast such vote. The committee rejected contestant's claim that "the intent of the voter should be given effect regardless of local Iowa laws," holding rather that—

> . . . [T]o presume now that the voters intended to vote otherwise than as expressed by their marked ballots would be to indulge in a presumption not justified in law or facts. We cannot assume that because voters voted for Roosevelt, or Hoover, who headed the respective tickets, that they intended to vote also for the candidates for Congress toward whom the voters indicated their neutrality.

Mr. Parker offered House Resolution 359 (1) from the floor as privileged on Apr. 25, 1934. The resolution, agreed to by voice vote and without debate, provided:

> *Resolved*, That Lloyd Ellis was not elected a Representative in the Seventy-third Congress from the Fifth Congressional District of the State of Iowa, and is not entitled to a seat as such Representative.
>
> *Resolved*, That Lloyd Thurston was elected a Representative in the Seventy-third Congress from the Fifth Congressional District of the State of Iowa, and is entitled to a seat as such Representative.

*Note:* Syllabi for Ellis v Thurston may be found herein at § 12.5 (balloting irregularities); §§ 37.6, 37.8 (interpretations of "straight ticket" votes).

### § 47.7 Felix v Muldowney

On Mar. 14, 1934, the Speaker (2) laid before the House a letter (3) from the Clerk transmitting the contest instituted by Anne E. Felix against Michael J. Muldowney from the 32d Congressional District of Pennsylvania. That communication, containing also original testimony and other accompanying papers, was referred to the Committee on Elections No. 2 and ordered printed.

The Committee on Elections No. 2 did not submit a report relating

1. 78 CONG. REC. 7371, 73d Cong. 2d Sess.; H. Jour. 440, 441.

2. Henry T. Rainey (Ill.).

3. 78 CONG. REC. 4508, 73d Cong. 2d Sess.; H. Jour. 259.

to this election contest during the 73d Congress, and the House took no other action with respect to the contest.

*Note:* Syllabi for Felix v Muldowney may be found herein at § 43.13 (failure of committee to submit report on contest).

### § 47.8 Fox v Higgins

Mr. Randolph Perkins, of New Jersey, submitted the report[4] of the Committee on Elections No. 3 on Mar. 10, 1934, in the election contest brought by William C. Fox against William L. Higgins from the Second Congressional District of Connecticut. The Speaker[5] had referred the contest to that committee on Jan. 5, 1934, on which date the Clerk had transmitted to him the notice of contest, original testimony and accompanying papers relative to the contest. The Speaker had ordered the Clerk's communication[6] printed (not designated as a House document).

In 56 of the 62 towns or voting districts comprising the Second Congressional District of Connecticut the "Australian ballot," by which voters could vote a "straight ticket" by marking an "X" in the circle above a party column, was employed as the official ballot. State law voided ballots marked with an "X" in more than one party circle. The report stated that the committee had no evidence as to the total number of ballots rejected for this reason in the 56 towns or elections districts, but that contestant had introduced evidence that in 28 of those districts 624 ballots were rejected for duplicity of voting.

Contestant's witnesses (election officers) testified that the term "Wet Party" appeared adjacent to the column designated as "Repeal, eighteenth amendment, Yes and No" on these ballots; that 447 of them had been marked both in contestant's "straight ticket" Democratic circle and in the "Wet Party" circle; and that 147 had been marked in contestee's "straight ticket" Republican circle and in the "Wet Party" circle. Contestant requested the committee to credit him with the 300-vote differential, which, when taken from contestee's official plurality of 221 votes, would establish contestant as having been elected by 79 votes.

Contestant contended that "by reason of the juxtaposition of the 'Wet Party' column and the 'repeal

4. H. Rept. No. 894, 78 CONG. REC. 4185, 4223, 73d Cong. 2d Sess.; H. Jour. 247.
5. Henry T. Rainey (Ill.).
6. 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

of the eighteenth-amendment' column, voters were confused and voted their straight-party affiliations and then, through confusion, intending to vote for repeal, voted in the 'Wet Party' circle, and thus vitiated their ballots." Contestant also alleged that contestee, in his capacity as secretary of state, had intentionally caused such confusion by preparing the ballots, and that contestee had induced one Michael H. Rollo to become a candidate for Congress with the party platform and designation of "Wet Party" so as to confuse the electors and vitiate their "Straight-ticket" votes.

The committee found no evidence to justify it in reporting that the official count of the votes was incorrect. The committee also stated that contestant had produced no evidence that Mr. Rollo's candidacy was in any way procured or induced by the contestee or by anyone in his behalf. Mr. Rollo, called as a witness before the committee by contestant, testified that his candidacy had not been solicited by contestee.

The committee found that though "it is not improbable that some voters were confused," the evidence showed that the ballots had been prepared according to law by a deputy secretary of state who had placed the "Wet Party" last on the ticket in the Second District because it was only being voted on in that district and not statewide. The evidence also showed that the parties to be voted on statewide were listed first, followed by the names of the local parties on certain ballots that were printed separately. The committee found that contestee, as secretary of state, had not "designedly caused the ballots to be printed in order to create confusion, or for the purpose of obtaining an advantage as a candidate. . . ."

The committee found, consistent with contestant's admission, that "the ballots which were rejected should have been rejected" under state law prohibiting voting for more than one "straight ticket." Five witnesses testified that they had intended to vote their regular party affiliation and, for repeal, and had mistakenly voted for the "Wet Party." The report stated that "this was not the case of an ambiguous or doubtful ballot, where the committee can look at the circumstances surrounding the election explaining the ballot, and get at the intent and real act of the voter." Rather, as the ballots had been marked for Mr. Rollo as well as for other candidates, the committee could not

determine whether voters had intended to vote for Mr. Rollo and otherwise for a straight Republican or Dermocratic ticket, or to cast a straight vote for contestant's (Democratic) ticket or contestee's (Republican) ticket and for repeal of the 18th amendment. The committee found the question of intention of the voters of the rejected ballots to be a matter of conjecture, and the evidence before the committee in this respect to be "wholly unreliable."

The committee report accompanied House Resolution 296,[7] which was called up as privileged by Mr. Clark W. Thompson, of Texas, on May 28, 1934. The resolution, which was agreed to by voice vote and without debate, provided:

> *Resolved,* That William C. Fox is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Second Congressional District of the State of Connecticut.
>
> *Resolved,* That William L. Higgins is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Second Congressional District of the State of Connecticut.

*Note:* Syllabi for *Fox* v *Higgins* may be found herein at § 11.1 (confusing the voters as grounds for contest); § 12.6 (balloting irregularities); § 37.1 (ambiguous ballots); and § 38.3 (voter intention as paramount concern in interpreting ballot).

### § 47.9 Gormley v Goss

On Mar. 13, 1934, Mr. Joseph A. Gavagan, of New York, submitted the report[8] of the Committee on Elections in the election contest brought by Martin E. Gormley against Edward W. Goss from the Fifth Congressional District of Connecticut. The Speaker[9] had referred the contest to that committee on May 9, 1933, on which date the Clerk had transmitted to him the notice of contest, original testimony, papers, and documents relative to the contest. The Speaker had ordered the Clerk's communication printed.[10]

According to the official returns of the election held Nov. 8, 1932, contestee received 42,132 votes to 42,054 votes for contestant—a majority of 78 votes for contestee.

Contestant alleged that through "fraud, irregularities, corruption, and deceit" on the part of contestee's agents at voting booth No. 1 in the third voting precinct

**7.** 78 CONG. REC. 9760, 73d Cong. 2d Sess.; H. Jour. 587.

**8.** H. Rept. No. 893, 78 CONG. REC. 4035, 73d Cong. 2d Sess.; H. Jour. 244.

**9.** Henry T. Rainey (Ill.).

**10.** 77 CONG. REC. 3085, 73d Cong. 1st Sess.; H. Jour. 245, 246.

in the city of Waterbury, he was "deprived of many votes far in excess of the number of votes necessary to overcome contestee's majority."

Contestee requested dismissal of the allegations raised in the notice of contest on the ground that they were "vague and uncertain and were lacking in necessary particulars" as required by statutes (2 USC § 201). The committee heard argument as to the sufficiency of the notice of contest, and agreed that contestant's notice of contest did not meet the requirements of the statute.

The committee considered the evidence in the case following the "postulates" that:

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

2. That election officials are presumed to have performed their duties loyally and honestly.

3. The burden of coming forward with evidence to meet or resist these presumptions rests with the contestant.

Witnesses who had voted in the precinct in question testified that the moderator of the voting district, Thomas Summa, "on occasions was seen to stick his head into the voting booth and on some occasions to enter the said booth'."

Considering all the testimony relating to booth No. 1 in the third voting precinct, the committee found that "confusion existed" with regard to voting on the question of "the repeal or maintenance of the eighteenth amendment," and as to this question's placement on the voting machine. The committee further found that many voters were seeking information in this respect and "were given assistance and attention"; and that there were no complaints made to the nonpartisan election board as to "irregularity, interference, or fraud." Of all witnesses called, none testified that any of the votes cast were fraudulently obtained by the contestee, and further that the intent of the voter was not vitiated by any interference with the keys on the voting machine.

Contestant alleged that Mr. Summa conspired with contestee to influence voters in the booth by putting his head inside the curtain, speaking to the voters, or entering the booth. This thesis the committee rejected on the basis that they would have to ignore the fact that "the polling place in question was in charge of a bipartisan election board" and arbitrarily assume "that the Democratic members thereof were either deaf, dumb, and blind, or willfully corrupt conspirators." Deciding that such conclusion "would

be arbitrary, unjust, and unworthy of a judicial body," the committee concluded instead that:

> . . . [T]he contestant has failed to establish the allegations contained in the notice of contest, has failed by a fair preponderance of the evidence to establish any fraud, deceit, or conspiracy on the part of the contestee and the election official or officials engaged in the election in question.

The committee report accompanied House Resolution 346,[11] which was called up as privileged by Mr. Gavagan on Apr. 20, 1934. The resolution, which was agreed to by voice vote and without debate, provided:

> *Resolved*, That Edward W. Goss vas elected a Representative in the Seventy-third Congress from the Fifth Congressional District in the State of Connecticut and is entitled to a seat as such Representative.

*Note:* Syllabi for *Gormley* v *Goss* may be found herein at § 12.1 (voter confusion as excuse for official's entering booth); § 22.1 (failure to state grounds with particularity); § 36.5 (official returns as presumptively correct); § 42.2 (resolution disposing of contest as privileged).

### § 47.10 LaGuardia v Lanzetta

On Jan. 5, 1934, the Speaker[12] laid before the House a letter[13] from the Clerk transmitting his unofficial knowledge of the institution of an election contest by Fiorello H. LaGuardia against James J. Lanzetta from the 20th Congressional District of New York. It related that a copy of notice of contest and reply thereto had been filed with the Clerk, but that, since no testimony had been transmitted within the time prescribed by law, the contest had apparently abated. The Clerk's communication and accompanying papers were referred to the Committee on Elections No. 1 and ordered printed.

The Committee on Elections No. 1 did not submit a report relating to this election contest during the 73d Congress, and the House took no action to dispose of the contest.

*Note:* Syllabi for *LaGuardia* v *Lanzetta* may be found herein at § 15.2 (failure to take testimony within prescribed time).

### § 47.11 Lovette v Reece

On Apr. 23, 1934, Mr. Clarence E. Hancock, of New York, submitted the report[14] of the Committee on Elections No. 1 in the election contest of O. B. Lovette against B. Carroll Reece from the First Congressional District of

**11.** 78 CONG. REC. 7087, 73d Cong. 2d Sess.; H. Jour. 424.

**12.** Henry T. Rainey (Ill.).

**13.** 78 CONG. REC. 136, 137, 73d Cong. 2d Sess.; H. Jour. 28.

**14.** H. Rept. No. 1306, 78 CONG. REC. 7186, 7190, 73d Cong. 2d Sess.; H. Jour. 431.

Tennessee. The contest had been referred to that committee on Jan. 5, 1934, on which date the Speaker[15] had laid before the House a letter[16] from the Clerk transmitting the notice of contest and original testimony. The Speaker had ordered the Clerk's communication printed with accompanying papers.

The report stated that in the general election held on Nov. 8, 1932, of six candidates for Representative from the First Congressional District of Tennessee, contestee had received 30,366 votes to 27,888 votes for contestant, with 7,950 votes for one Tipton and a few hundred other votes for the three remaining candidates, leaving a plurality of 2,478 votes for contestee over contestant. Contestant filed timely notice of contest on Dec. 17, 1932, to which contestee filed timely answer and motion to dismiss on Jan. 15, 1933. Then, in April of 1933, contestant filed an amended and supplemental notice of contest.

The committee first found that contestant (Mr. Lovette) had not sustained the grounds of contest set forth in the original notice, which alleged fraudulent uses of money to influence the election, and which allegations were based on hearsay testimony. Specifically the committee found that the alleged instances of fraud and irregularities were more probably connected with simultaneous elections for Governor and for President, and that contestee (Mr. Reece) had not participated in such practices and had not benefited therefrom more than had contestant.

With respect to the amended and supplemental notice, though filed after the time prescribed by law for the filing of notice of contest, the committee granted contestant's request that testimony of certain witnesses, taken pursuant to such notice and after expiration of the prescribed time period, be printed.

The committee found that, as to the allegations that contestee's brother had collected large sums of money to finance contestee's election, the evidence indicated that those efforts had been concentrated upon securing a nominee for Governor and involved transactions occurring after the election not connected with contestee. Accordingly, the committee concluded that "the evidence adduced by contestant fails utterly to support the charges in the original notice of contest and

**15.** Henry T. Rainey (Ill.).

**16.** 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

in the amended and supplemental notice, and that what little evidence there is which might tend to support some of the allegations is so vague and inconclusive as to cast no doubt on the right of contestee to retain his seat."

The report recommended the adoption of House Resolution 358,[17] which Mr. Homer C. Parker, of Georgia, offered from the floor as privileged on Apr. 25, 1934. The resolution, which was agreed to without debate and by voice vote, provided:

> *Resolved,* That O. B. Lovette was not elected a Representative to the Seventy-third Congress from the First Congressional District of the State of Tennessee, and is not entitled to a seat therein.
>
> *Resolved,* That B. Carroll Reece was duly elected a Representative to the Seventy-third Congress from the First Congressional District of the State of Tennessee, and is entitled to retain his seat therein.

*Note:* Syllabi for *Lovette* v *Reece* may be found herein at § 10.20 (illegal use of funds); § 20.3 (notice of contest filed late); § 35.9 (allegations of improper expenditures).

### § 47.12 McAndrews v Britten

Mr. Homer C. Parker, of Georgia, submitted the report[18] from the Committee on Elections No. 1 on Apr. 23, 1934, in the election contest of James McAndrews against Fred A. Britten from the Ninth Congressional District of Illinois. The contest had been referred to that committee on Jan. 5, 1934, on which date the Speaker[19] had laid before the House a letter[20] from the Clerk transmitting the notice of contest, testimony and other papers.

The report stated that contestee had received 40,253 votes from the official returns of the election held Nov. 8, 1932, and that contestant had received 36,596 votes in that election, a plurality of 3,657 votes for contestee.

In his notice of contest, contestant alleged that contestee had violated the Federal Corrupt Practices Act and that contestee had received a "split-vote" so disproportionately large as compared to the "straight votes" cast for him "that the presumption of fraud naturally and necessarily follows." The committee report rejected all such allegations as not supported by the evidence, stating that "the testimony of a so-called 'expert' upon the disproportionate split vote is so frail and unconvincing in its nature as to leave no doubt

**17.** 78 CONG. REC. 7371, 73d Cong. 2d Sess.; H. Jour. 440.

**18.** H. Rept. No. 1298, 78 CONG. REC. 7166, 7190, 73d Cong. 2d Sess.; H. Jour. 431.

**19.** Henry T. Rainey (Ill.).

**20.** 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

in the mind of the committee of the falsity of the charge of fraud by reason of said disproportionate split vote."

The contestant's allegations and the committee's grounds for their rejection were more specifically elaborated in debate on the floor of the House on Apr. 26, 1934. On that date, Mr. Parker offered House Resolution 362 [1] from the floor as privileged. Mr. Parker had, on Apr. 25, 1934, offered that resolution [2] for the immediate consideration of the House. When a Member had sought time to debate the resolution, Mr. Parker withdrew the resolution and sought unanimous consent that it be considered the following day after disposition of business on the Speaker's table. The Speaker informed Mr. Parker that such request was not necessary, as the resolution was privileged and could be called up at any time.

On Apr. 26, immediately upon the offering of the resolution by Mr. Parker, Mr. Adolph J. Sabath, of Illinois, sought recognition to offer a "substitute" for the resolution. Mr. Parker refused to yield for that purpose and was recognized by the Speaker pro tempore [3] for one hour. Mr. Sabath thereupon asked unanimous consent that his "substitute" be read for the information of the House, to which request Mr. Ralph R. Eltse, of California, objected. Mr. Parker then yielded 30 minutes for debate to Mr. John B. Hollister, of Ohio, and 15 minutes to Mr. Sabath. Mr. Sabath read the substitute which he had attempted to offer:

> Whereas Committee on Elections No. 1, on March 15, 1934, ordered a recount of the votes cast in the election held November 8, 1932, in the Ninth Congressional District in the State of Illinois; and
>
> Whereas a subcommittee was authorized to recount the ballots and to obtain a determination of the actual votes cast for contestant and contestee; and
>
> Whereas notwithstanding said action of said committee, and without said recount having been made, the committee reported on April 23 to the House recommending the adoption of a resolution entitling contestee to retain his seat; and
>
> Whereas the action of the committee was taken without notice to the contestant, and thereby nullified its own previous action without due procedure or formality of notice to contestant: Therefore be it
>
> *Resolved,* That the Committee on Elections No. 1, or a subcommittee thereof, is hereby authorized to recount the ballots cast in said election and to

1. 78 CONG. REC. 7456, 73d Cong. 2d Sess.; H. Jour. 448.
2. 78 CONG. REC. 7371, 73d Cong. 2d Sess.
3. Claude V. Parsons (Ill.).

report to the House the number of votes received by the contestant and the number of votes received by the contestee.

Mr. Sabath also stated that Mr. Parker had, on Apr. 16, 1934, introduced House Resolution 335 which was referred to the Committee on Accounts and which provided that "$2,500 be appropriated for the purpose of defraying the expense of recounting the ballots in the city of Chicago." No action was taken on that resolution.

In response to Mr. Sabath's criticism of these committee actions, Mr. Parker stated that the Committee on Elections No. 1 had voted to conduct a recount on Mar. 15, 1934, "because it believed that neither party to the contest objected to the ballots being counted," and that upon a rehearing in which contestee's objections to such procedure were presented, the committee had voted unanimously to reconsider the ordering of the recount. Mr. Lindsay C. Warren, of North Carolina, defended the action of the Committee on Accounts in not reporting the expense resolution, as no reason had been given that committee to justify a recount and as the Committee on Elections had unanimously reconsidered and decided against such recount.

With respect to alleged violations of the Corrupt Practices Act, contestant had claimed, and contestee acknowledged on the floor of the House during debate on the resolution, that contestee had "offered prizes to the various precinct captains whose precincts voted the largest votes in proportion to the Republican votes that were given in these precincts." Mr. David D. Terry, of Arkansas, defended the committee finding that this offering of prizes was not a violation of 2 USC § 150 which provided:

> It is unlawful for any person to make or offer to make an expenditure or to cause an expenditure to be made or offered to any person either to vote or withhold his vote or to vote for or against any candidate, and it is unlawful for any person to solicit, accept, or receive any such expenditure in consideration of his vote or the withholding of his vote.

Mr. Parker contended that the large split vote for contestee had been the case for many members of contestee's political party, as they had to have "run ahead of the ticket" to have been elected on Nov. 8, 1932, as a candidate of that party.

After Mr. Parker moved the previous question, which was ordered by voice vote, the resolution was agreed to by voice vote. It provided:

> *Resolved,* That James McAndrews was not elected a Representative to the

Seventy-third Congress from the Ninth District of the State of Illinois and is not entitled to a seat therein.

*Resolved*, That Fred A. Britten was duly elected a Representative to the Seventy-third Congress from the Ninth Congressional District of the State of Illinois and is entitled to retain his seat.

*Note:* Syllabi for McAndrews v Britten may be found herein at § 11.4 ("prizes" to campaign workers); § 12.4 (balloting irregularities); § 41.6 (reconsideration of action of ordering a recount); § 42.3 (resolution disposing of contest as privileged); § 42.17 (substitute resolutions).

### § 47.13 Reese v Ellzey

On Feb. 9, 1934, Mr. John H. Kerr, of North Carolina, submitted the report[4] of the Committee on Elections No. 3 in the election contest of Reese v Ellzey from the Seventh Congressional District of Mississippi. The contest had been referred to that committee on Jan. 5, 1934, on which date the Speaker[5] had laid before the House a letter[6] from the Clerk transmitting his "unofficial knowledge" of the contest together with contestant's letter of withdrawal therefrom. Upon referral, the Clerk's letter and accompanying papers had been ordered printed.

The committee report contained contestant's letter of withdrawal from the contest. Contestant claimed that the election of Nov. 8, 1932, was void "when two so-called 'Republican' tickets were placed on the ballot in this district," that "in the failure to appoint a single Republican election officer or judge in the entire district as mandated by the laws of the State of Mississippi, there was also a direct and willful violation of the law" and that "my party and myself have been illegally discriminated against." Nevertheless, "while so many matters of vital importance require the attention of the Congress, it would be unpatriotic on my part to attempt to occupy the time of Congress about a matter of such trivial importance to the welfare of our country." The committee report accompanied House Resolution 261,[7] Mr. Kerr offered from the floor as privileged on Feb. 24, 1934. The resolution was agreed to by voice vote and without debate after Mr. John E. Rankin of Mississippi, observed that the resolution incor-

4. H. Rept. No. 696, 78 CONG. REC. 2282, 2292, 73d Cong. 2d Sess.; H. Jour. 153.

5. Henry T. Rainey ( Ill.).

6. 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

7. 78 CONG. REC. 3165, 73d Cong. 2d Sess.; H. Jour. 202.

rectly referred to the Eighth Congressional District, rather than to the Seventh Congressional District of the State of Mississippi. Mr. Kerr obtained unanimous-consent permission that the resolution be corrected accordingly. As thus amended, the resolution—

> *Resolved,* That L. G. Reese is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Seventh Congressional District of the State of Mississippi; and be it further
>
> *Resolved,* That Russell Ellzey is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Seventh Congressional District of the State of Mississippi.

*Note:* Syllabi for Reese v Ellzey may be found herein at § 6.10 (items transmitted by Clerk); § 43.12 (effect of contestant's withdrawal or abandonment of contest).

### § 47.14 Kemp, Sanders Investigation

On June 19, 1933, three days after the adjournment of the first session of the 73d Congress, the death of Mr. Bolivar E. Kemp created a vacancy in the seat from the Sixth Congressional District of Louisiana.

On Jan. 3, 1934, the date of the convening of the second session of the 73d Congress, the Speaker[8] laid before the House a letter[9] from the Clerk transmitting a certificate of election of Mrs. Bolivar E. Kemp, Sr., signed by the Governor of Louisiana and attested by the Secretary of State of Louisiana, to fill the vacancy. The Clerk's letter also transmitted a certificate of election of J. Y. Sanders, prepared by the "Citizens' Election Committee of the Sixth Congressional District," to fill said vacancy. Thereupon, Mr. Riley J. Wilson, of Louisiana, offered from the floor House Resolution 202:[10]

> *Resolved,* That the question of prima facie as well as the final right of Mrs. Bolivar E. Kemp, Sr., and J. Y. Sanders, Jr., contestants, respectively, claiming a seat in this House from the Sixth District of Louisiana, be referred to the Committee on Elections No. 3; and until such committee shall have reported in the premises and the House decided such question neither of said contestants shall be admitted to a seat.

Mr. Wilson, recognized for one hour on his resolution, expressed the acquiescence of the Louisiana delegation and of the contestants in its adoption. The resolution was agreed to by voice vote.

On Jan. 20, 1934,[11] Mr. John H. Kerr, of North Carolina, sub-

**8.** Henry T. Rainey (Ill.).

**9.** 78 CONG. REC. 11, 12, 73d Cong. 2d Sess.; H. Jour. 13, 14.

**10.** 78 CONG. REC. 12, 73d Cong. 2d Sess.; H. Jour. 14.

**11.** H. Rept. No. 334, 78 CONG. REC. 1035, 73d Cong. 2d Sess.; H. Jour. 80.

mitted the unanimous report of the Committee on Elections No. 3 to accompany House Resolution 231.[12] The committee found no dispute concerning the facts involving the election held on Dec. 5, 1933, at which Mrs. Kemp received about 5,000 votes (a few votes having been cast for other parties), and involving the election held on Dec. 27, 1933, at which Mr. Sanders received about 15,000 votes (a few votes having been cast for other parties).

The report relates as undisputed fact that from the time of the death of Bolivar E. Kemp on June 19, 1933, until Nov. 27, 1933, the Governor of Louisiana did not issue a writ of election to fill the vacancy, though he was "petitioned by thousands of voters of the Sixth Congressional District to issue his proclamation. . . ." According to the report, "On the 27th day of November 1933, there was delivered to the district committee in the city of New Orleans outside the Sixth Congressional District a proclamation calling for an election to be held within eight days, namely, on the fifth day of December 1933." In his statement made in debate on Jan. 29, 1934, however, Mr. Kerr related that the proclamation of the Governor had been "entrusted to the executive committee of the Sixth District, and that committee, outside the district, in the city of New Orleans, called an election pursuant to this proclamation of the Governor, or at least announced that there would be an election, and undertook to name a candidate to be voted on at that election."

On Nov. 28, 1933, the Citizens' Election Committee of the Sixth Congressional District met in the district and fixed the day for the "election" at Dec. 27, 1933, 30 days after the meeting.

The report then undertook to recite and interpret federal and state law governing the holding of elections to fill vacancies. The report cited provisions of the U.S. Constitution permitting the states to prescribe the time, place, and manner of holding elections for Representatives, subject to alteration by Congress (art. I, § 4), and providing that the state executive authority "shall issue writs of election" to fill vacancies in the House of Representatives (art. I, § 2). Citing *Ex parte Clarke* (1879), 100 U.S. 399, the committee affirmed the power of Congress to adopt the laws of the states regulating methods of electing Representatives.

The report recited portions of the laws of Louisiana (the general

**12.** See 78 CONG. REC. 1521, 73d Cong. 2d Sess., Jan. 29, 1934, where resolution was adopted.

election law, Act 130, A.D. 1916, and the primary law, Act 97, A.D. 1922) relevant to the choosing of candidates for filling vacancies and to the filling of such vacancies:

> That it shall be the duty of the Governor, at least thirty days before every general election, to issue his proclamation, giving notice thereof, which shall be published in the official journal.
>
> In case of a vacancy in the said office of Representative in Congress, between the general elections, it shall be the duty of the Governor by proclamation to cause an election to be held *according to law* to fill such vacancy. (Emphasis added.)

From this, the committee concluded that "the proclamation of the Governor, who is required by law to call either a general or special election, carries with it the duty to give the electorate a reasonable notice of the time, place, and manner of such election, and the failure to give said notice is a contravention of both the spirit and the letter of the law."

The report then cited section 9 of the primary election law which provided:

> That whenever a special election is held to fill a vacancy for an unexpired term caused by death, resignation or otherwise of any officer, the respective committees having authority to call primary elections to nominate candidates for said office, shall have full authority to fix the date at which a primary election shall be held to nominate candidates in said special election, which date shall not be less than *ten days after the special election shall have been ordered.*

The committee concluded that "it is mandatory that the Governor should give more than 10 days' notice of said election in order that the district committee might comply with the law and allow the electorate of the district to select a candidate," i.e., "to call a primary 'within not less than 10 days after the special election has been called'."

Section 1 of the primary law provided:

> That all political parties shall make all nominations for candidates for the United States Senate, Members of the House of Representatives in the Congress . . . *by direct primary elections.* That any nomination, of any person for any of the aforesaid mentioned offices by any other method *shall be illegal,* and the secretary of state is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of this act.

The report stated that "in this state a nomination in a Democratic primary assures the candidate of election, at either a special or general election; and this makes the primary most important." Thus the primary election was, in effect, the sole method of selecting candidates.

Section 31 of the primary laws provided three exceptions to the requirement of direct primary elections:

> That all vacancies caused by death or resignation or otherwise among the nominees selected by any political party, under the provisions of this act, shall be filled by the committee, which has jurisdiction over the calling and ordering of the said primary election, and in the event that no person shall have applied to become a candidate for a political office within the time fixed by law, or the call of the committee ordering the primary, or in any other event wherein the party shall have no nominee selected under the provisions of this act, the committee calling the primary shall select the nominee for 'any position named in the call of the committee and shall have full authority to certify said name as the nominee of the said party: . . .

The report found that the district committee, without "calling" a primary election, "undertook and did name Mrs. Kemp as the candidate to be voted for at the December 5 election, called by the Governor" and that "this procedure of the district committee could not come within the exceptions defined in section 31 of the primary law." During debate in the House on Jan. 29, 1934, Mr. Kerr attempted to clarify the intent of section 31 as permitting a committee to supply nominees where none or only one had applied in response to the primary call, "so that the people could have the opportunity of selecting their candidate." Mr. Cox raised the question whether if the election were called at a time that made impossible the holding of a primary election, the committee might then make the nomination itself. Mr. Kerr replied that "the committee had no right under the law to participate in any kind of action which deprived the people of the state of Louisiana of nominating a candidate." Mr. Cleveland Dear, of Louisiana, interpreted the language "or in any other event wherein the party shall have no nominee selected under the provisions of this act" as not permitting the executive committee to make a nomination where there has been no primary election unless such primary had been called. Citing the section 31 language "the committee calling the election," Mr. Dear contended that the committee must call a primary election as a condition precedent to its powers of nomination, as "there must be a time fixed for them (candidates) to qualify. . . . Under this section the committee calling and ordering the primary has authority to select the nominee for any position named in the call of the committee clearly indicated that there must be first a call before it is au-

thorized to name such a nominee." The report concluded that "both the nomination and election of Mrs. Kemp are illegal and void; that the Governor's proclamation was not in accordance with the law; and the voters of the district were not allowed to choose a candidate in the method approved by law, and therefore, Mrs. Kemp is not entitled to a seat in the House of Representatives."

On Jan. 22, 1934, Mr. Ross A. Collins, of Mississippi, took the floor[13] to dissent from the committee report which had been submitted Jan. 20. He contended that Mrs. Kemp should have been granted prima facie right to a seat, her credentials being regular in form and there being no question as to her constitutional and personal qualifications. To this Mr. Charles L. Gifford, of Massachusetts, replied that the House had on Jan. 3, 1934, determined that such question be referred to the Committee on Elections for report. During debate on Jan. 29, 1934, Mr. Randolf Perkins, of New Jersey, claimed that "there could be no prima facie right unless there were a legal election. A mere certificate would not establish prima facie right; there would have to be underlying that certificate a legal election."

Mr. Collins cited McCrary on Elections (George McCrary, *A Treatise on the American Law of Elections,* Chicago, Callaghan & Co., 1897), paragraphs 185 and 186, in support of his contention that the Governor may fix the time for a special election to fill a vacancy where the legislature has not established such time, and where the existence of five candidates, none of whom might achieve a majority in the first primary, would under state primary law force subsequent primaries beyond Jan. 1, 1934, at which time state law would void the existing registrations of voters and require new registrations. Mr. Collins also supported the nomination of Mrs. Kemp by the committee, absent the calling of a primary, claiming that the words "calling the primary" in section 31 were "merely descriptive of the committee whose duty it is to make the nomination. Were it not for this descriptive language, some other congressional committee might claim the right to make the nominations."

With respect to the election of Mr. Sanders on Dec. 27, 1933, as called by the "Citizens Election Committee," the view was taken that such election was illegal and void, there being no political machinery under the laws of Louisiana providing therefor.

On Jan. 20, 1934, Mr. Kerr called up House Resolution 231 as

**13.** 78 CONG. REC. 1109–11, 73d Cong. 2d Sess.

privileged, and obtained unanimous consent permission that time for debate be extended to one and one-half hours, to be equally divided and controlled by himself and Mr. Gifford. In response to the parliamentary inquiry of Mr. Cassius C. Dowell, of Iowa, the Speaker upheld the propriety of that clause in the resolution which required the Speaker to notify the Governor of Louisiana of the action taken by the House in declaring the seat vacant.

After debate, Mr. Kerr moved the previous question on the resolution, which was ordered by a voice vote. Thereupon, House Resolution 231 was agreed to by voice vote. The resolution stated:

> *Resolved,* That there was no valid election for Representative in the House of Representatives of the Seventy-third Congress from the Sixth Congressional District of the State of Louisiana on the 5th day of December, or the 27th day of December, 1933, and that neither Mrs. Bolivar E. Kemp nor J. Y. Sanders, Jr., is entitled to a seat therein; and be it further
>
> *Resolved,* That the Speaker communicate to the Governor of the State of Louisiana that there is a vacancy in the representation of that State in the Sixth Congressional District thereof.

*Note:* Syllabi for the Kemp, Sanders investigation may be found herein at § 4.3 (House power over administration of oath to candidate in election contests); § 6.2 (items transmitted by Clerk); § 9.1 (certificates of election); §§ 10.17, 10.18 (improperly conducted special election); § 10.19 (improperly conducted primary elections); § 42.12 (disposal of contest by resolution declaring seat vacant); § 42.15 (resolution admitting neither contestant to a seat).

### § 47.15 Shanahan v Beck

Mr. John H. Kerr, of North Carolina, submitted the report (14) of the Committee on Elections No. 3 on Feb. 9, 1934, in the election contest of John J. Shanahan against James M. Beck from the Second Congressional District of Pennsylvania. The contest had been referred to that committee on Jan. 5, 1934, on which date the Speaker (15) had laid before the House a letter (16) from the Clerk transmitting a copy of the notice of contest and reply, with the statement that no testimony had been received within the time prescribed by law and that the contest appeared to have abated. The Speaker had ordered that communication to be printed (not designated as a House document).

The report confirmed that "there was no evidence before the

**14.** H. Rept. No. 694, 78 CONG. REC. 2282, 2292, 73d Cong. 2d Sess.; H. Jour. 153.

**15.** Henry T. Rainey (Ill.).

**16.** 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

committee of the matters charged in (the) notice of contest, and no briefs filed, as provided by law." The committee found such "laches" to be inexcusable under the circumstances, but permitted contestant to withdraw unprinted evidence which he had submitted while testifying before the committee without prejudice. Finally, the report stated that contestee had evidently been elected by a majority of more than 14,000 votes in the election held Nov. 8, 1932.

The report accompanied House Resolution 259,[17] which Mr. Kerr offered from the floor as privileged on Feb. 24, 1934. The resolution was agreed to by voice vote and without debate. It provided:

> *Resolved,* That John J. Shanahan is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Second Congressional District of the State of Pennsylvania; and be it further
>
> *Resolved,* That James M. Beck is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Second Congressional District of the State of Pennsylvania.

*Note:* Syllabi for Shanahan v Beck may be found herein at § 15.3 (failure to take testimony within prescribed time); § 16.2 (inexcusable delay in filing briefs in taking testimony); § 25.2 (failure to produce evidence); § 22.1 (withdrawal of evidence).

### § 47.16 Weber v Simpson

On May 4, 1934, Mr. John H. Kerr, of North Carolina, submitted the report[18] of the Committee on Elections No. 3 in the election contest brought by Charles H. Weber against James Simpson, Jr. and Ralph E. Church from the 10th Congressional District of Illinois.

At the conclusion of the 72d Congress, on Mar. 3, 1933, the Speaker[19] had laid before the House a letter[20] from the Clerk transmitting a subpena duces tecum served upon him by contestant's notary public and requesting the production of documents filed by contestee (Mr. Simpson) in compliance with the Corrupt Practices Act. The Clerk's letter included his reply by which he had refused to comply with the subpena pending approval of the House. The communication and accompanying papers were referred to the Committee on the Judiciary and ordered printed (not

**17.** 78 CONG. REC. 3165, 73d Cong. 2d Sess.; H. Jour. 201, 202.

**18.** H. Rept. No. 1494, 78 CONG. REC. 8085, 8122, 73d Cong. 2d Sess.; H. Jour. 489.

**19.** John N. Garner (Tex.).

**20.** 76 CONG. REC. 5581, 72d Cong. 2d Sess.; H. Jour. 64.

designated as a House document). The 72d Congress did not authorize the Clerk to respond to the subpena duces tecum.

The contest was transmitted to the Seventy-third Congress on Jan. 16, 1934, on which date the Speaker[1] laid before the House a letter[2] from the Clerk. The communication was referred to the Committee on Elections No. 3 and ordered printed (not designated as a House document).

At the general election held Nov. 8, 1932, contestee (Mr. Simpson) had received 101,671 votes to 100,449 votes for contestant and to 45,067 votes for Mr. Church, a plurality of 1,222 votes for contestee. Contestant thereafter examined the tally sheets in all of the 516 precincts comprising the 10th Congressional District, and found discrepancies in 128 precincts which reduced contestee Simpson's plurality to 920 votes.

Contestant requested that the committee order a recount of all ballots cast, based on the mistakes shown to have existed in 128 precincts. The committee denied this request, finding no evidence of irregularities, intimidation or fraud in the casting of ballots. The committee concluded that "contestant has failed to overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee." House Resolution 374[3] was submitted on May 4, 1934, by Mr. Kerr with the report, and was referred to the House Calendar. As recommended by the committee, the resolution—

> *Resolved,* That Charles H. Weber is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Tenth Congressional District of the State of Illinois; and further
>
> *Resolved,* That James Simpson, Jr. is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Tenth Congressional District of the State of Illinois.

The resolution was not called up during the 73d Congress.

*Note:* Syllabi for Weber v Simpson may be found herein at § 6.13 (items transmitted by Clerk); § 30.1 (Clerk's refusal to respond to subpena); §§ 36.1, 36.7 (official returns as presumptively correct); § 44.7 (burden of proving recount would change election result); § 42.20 (House failure to take action on reported resolutions).

## § 48. Seventy-fourth Congress, 1935–36

### § 48.1 Lanzetta v Marcantonio

1. Henry T. Rainey (Ill.).
2. 78 CONG. REC. 760, 761, 73d Cong. 2d Sess.; H. Jour. 64.
3. 78 CONG. REC. 8085, 8122, 73d Cong. 2d Sess.; H. Jour. 489.

On June 19, 1936 (Calendar Day, June 20, 1936), Mr. Milton H. West, of Texas, submitted the unanimous report[4] from the Committee on Elections No. 1 in the contested election case brought by James J. Lanzetta against Vito Marcantonio from the 20th Congressional District of New York. The contestee, Marcantonio, had received a majority of 246 votes from the official tabulation of votes cast in the election held Nov. 6, 1934. Contestant had filed notice of his intention to contest on Dec. 31, 1934, with timely answer by contestee. More than 4,000 pages of testimony and exhibits were taken, but the testimony of contestant was not taken until after the expiration of the 90-day period prescribed by 2 USC § 203 (running from the time contestee's answer was filed).

On Jan. 6, 1936, the Speaker had laid before the House a letter from the Clerk of the House[5] transmitting information that the notice of contest and reply thereto had been filed with his office and that the Clerk would forward to the Committee on Elections the testimony adduced on behalf of contestee within the time prescribed by law. No testimony had at that time been received on behalf of contestant. The Speaker referred the Clerk's communication to the Committee on Elections No. 1, and ordered it printed as a House document. The Clerk then permitted each party 30 days to file his brief with his office, pursuant to 2 USC § 223. The Clerk did not order printed that portion of the testimony taken after the expiration of the time required by law and received by the Clerk after referral of his letter. The Committee on Elections No. 1, however, having found some justification for delay, considered all testimony, it being made available to the committee by the Clerk pursuant to 2 USC § 223.

Contestant charged the violations by contestee "of nearly all of the election laws including intimidation of voters, violation of the Corrupt Practices Act, illegal and excessive expenditure of money, failure to account for various contributions, inciting and leading riots," and other infractions. However, the committee found that none of the charges were sufficiently proven to warrant a committee recommendation that they be sustained. The committee concluded that it could not properly

**4.** H. Rept. No. 3084, 80 CONG. REC. 10615, 74th Cong. 2d Sess.; H. Jour. 689.

**5.** H. Doc. No. 383, 80 CONG. REC. 98, 74th Cong. 2d Sess.; H. Jour. 24.

decide the contest without causing further testimony to be taken, and that further testimony could not be taken due to the approach of adjournment *sine die* of the 74th Congress, second session.

As the result of certain irregularities on the part of contestee and his attorneys during the taking of testimony and refusals to testify or ignoring of subpenas by witnesses, the committee recommended—

> . . . [T]hat the present election laws be amended and some authority empowered to require witnesses to obey process and give their testimony.
>
> The committee feels that by the action of the contestee's attorneys and associates it has been denied the opportunity under the existing law to properly inquire into the fraud and corruption which was charged in this election.

The committee called the attention of the House to actions of contestee's attorneys and witnesses as follows:

(1) The attorneys for each side agreed to waive the requirement that witnesses sign testimony, and that stenographer transcripts would be sufficient; contestee's attorneys later refused to accept the agreed testimony (unsigned by witnesses), which necessitated further subpenas to witnesses, some of whom refused to respond or could not be found.

(2) Contestee's law partner, the campaign fund treasurer, refused to testify on the ground that time for taking testimony had expired, despite substantiated charges that contestee had not reported certain contributions.

House Resolution 560[(6)] was called up by Mr. West at the time he submitted the report from the Committee on Elections No. 1, and was agreed to without debate and by voice vote on June 19, 1936 (Calendar Day, June 20, 1936), the final day of the second session of the 74th Congress. House Resolution 560 provided as follows:

> *Resolved*, That James J. Lanzetta is not entitled to a seat in the House of Representatives of the Seventy-fourth Congress from the Twentieth Congressional District of the State of New York; and be it further
>
> *Resolved*, That Vito Marcantonio is entitled to a seat in the House of Representatives of the Seventy-fourth Congress from the Twentieth Congressional District of the State of New York

Prior to the adoption of the above resolution, Mr. James P. Buchanan, of Texas, had, on June 19, 1936 (Calendar Day, June 20, 1936), asked unanimous consent for the immediate consideration of House Joint Resolution 641[(7)]

**6.** 80 CONG. REC. 10615, 74th Cong. 2d Sess.; H. Jour. 690.

**7.** 80 CONG. REC. 10253, 74th Cong. 2d Sess.; H. Jour. 653.

which he introduced at that time from the floor and sent to the Clerk's desk, and which made "appropriations for the payment of expenses incurred in the election contest for a seat in the House of Representatives from the Twentieth Congressional District of the State of New York" as follows:

> *Resolved*, etc., That the following sums, respectively, are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for payment to the contestant and the contestee for expenses incurred in the contested-election case of Lanzetta against Marcantonio, Twentieth Congressional District of the State of New York, as audited and recommended by the Committee on Elections No. 1 of the House of Representatives, namely:
>
> To James J. Lanzetta, contestant, $2,000.
>
> To Vito Marcantonio, contestee, $1,739.83.
>
> The foregoing sums to be disbursed by the Clerk of the House of Representatives.

The joint resolution was passed without debate and by voice vote, passed by the Senate on the same day, and approved as Public Resolution No. 122.

*Note:* Syllabi for Lanzetta v Marcantonio may be found herein at §§ 27.7, 27.9 (extensions of time for taking testimony); § 28.1 (unsigned transcript of deposition by witness); § 30.2 (noncompliance with subpena); § 45.3 (payments from Treasury authorized by joint resolution).

### § 48.2 McCandless v King

On May 21, 1936, Mr. Joseph A. Gavagan, of New York, submitted the report [8] from the Committee on Elections No. 2 in a contested election case brought by Lincoln L. McCandless against Samuel W. King, Hawaii Territory. According to the official tabulation of votes, contestee (Mr. King) received 31,487 votes and contestant (Mr. McCandless) received 29,630, a majority of 1,857 for contestee. Contestant served and filed notice of contest on Dec. 15, 1934, with timely answer by contestee. The Clerk of the House transmitted the original testimony, papers, and documents to the Speaker on Jan. 6, 1936,[9] on which date the contested election case was referred to the committee. These documents accompanied the Clerk's letter, which the Speaker laid before the House and ordered printed.

The committee dismissed contestant's contentions of intimidation and coercion of voters by contestee, having found no com-

**8.** H. Rept. No. 2736, 80 CONG. REG. 7765, 74th Cong. 2d Sess.; H. Jour. 482.

**9.** H. Doc. No. 384, 80 CONG. REG. 98, 99, 74th Cong. 2d Sess.; H. Jour. 24.

petent evidence of such actions on the record.

The contestee moved to dismiss the contest as not having been timely commenced, i.e., "notice of contest not filed within 30 days after the result of the election (has) been determined by the officer or board of canvassers authorized by law to determine the same," as required by 2 USC § 201.

On Nov. 10, 1934, the Governor of the Territory of Hawaii issued a certificate of election to contestee; on Nov. 17, 1934, the Secretary of the Territory canvassed the vote and made a certification thereon. Section 85 of the Hawaiian Organic Act provided, regarding election of a Delegate to the U.S. House of Representatives:

> . . . [T]he conduct of the election shall be in conformity to the general laws of the Territory; that the person receiving the greatest number of votes shall be declared by the Governor duly elected, and a certificate shall be given accordingly.

The general elections laws of the Territory of Hawaii in effect at the time of the election provided that the secretary of the territory declare and certify election results. For this reason, the committee reported that the certificate issued by the Governor was without legal effect, that the proper certification was that issued by the secretary, that the contestant had therefore filed notice of contest (on Dec. 15, 1934) within the 30 days required by 2 USC § 201, and denied the contestee's motion to dismiss.

Contestant's third point of contention cited excessive campaign expenditures and contestee's failure to comply with the Corrupt Practices Act by filing with the Clerk of the House the required forms setting forth his campaign expenditures. The committee found that contestee had, within the 30-day period imposed by the act, written a letter to the Clerk of the House itemizing expenditures totaling $2,473.90 and stating that he would file the required forms upon arrival in Washington. The committee suggested that censure of contestee for his one-year delay in filing the forms might be in order; but the committee did not regard such delay as a sufficient basis for forfeiture of his seat, in the light of all the circumstances. Contestee's incomplete knowledge of the election laws and procedures, and the fact that the Clerk of the House had not mailed the required forms to contestee in Hawaii, were factors considered by the committee. The report then stated—

> . . . Furthermore, when analyzed, the contestee's statement shows no im-

proper or excessive expenditure. Your committee believes, therefore, that a strict interpretation of the requirements of law, under the circumstances of this case, might result in a wrong and injustice to the contestee and cloud a distinguished and honorable career. Considering that the contestee's failure to comply with the requirements of law in no way affected the rights of the contestant, your committee recommends that the issues raised by the contestant's third contention be dismissed.

Mr. Gavagan called up as privileged House Resolution 521 [10] on June 2, 1936, which incorporated the language recommended in the committee report as follows:

*Resolved,* That Lincoln Loy McCandless was not elected a Delegate from the Territory of Hawaii to the House of Representatives at the general election held November 6, 1934; and

*Resolved,* That Samuel Wilder King was elected a Delegate from the Territory of Hawaii to the House of Representatives at the general election held on November 6, 1934, and is entitled to his seat.

The previous question was ordered without debate, and the resolution was agreed to by voice vote.

*Note:* Syllabi for McCandless v King may be found herein at §§ 10.2, 10.5 (Corrupt Practices Act); § 20.4 (notice of contest filed late).

**10.** 80 CONG. REC. 8705, 74th Cong. 2d Sess.: H. Jour. 538.

## § 48.3 Miller v Cooper

On Mar. 5, 1936, Mr. John H. Kerr, of North Carolina, submitted the unanimous committee report [11] in the contested election case brought by Locke Miller against John G. Cooper, 19th Congressional District of Ohio.

According to the official tabulation of votes as certified by the Governor of Ohio, contestant had received 52,023 votes (27,335 of those votes having come from Mahoning County, one of three counties in the congressional district); whereas contestee had received a total of 56,200 votes (29,512 from Mahoning County); thus leaving a plurality of 4,177 votes for contestee in the district. Contestant filed timely notice of contest, with proper answer by contestee.

On Jan. 6, 1936, the Speaker laid before the House a letter from the Clerk of the House [12] transmitting the information that notice of contest and reply thereto had been filed with his office, and transmitting therewith "original testimony, papers, and documents relating thereto." The Speaker referred the Clerk's letter to the Committee on Elections No. 3 on

**11.** H. Rept. No. 2131, 80 CONG. REC. 3337, 74th Cong. 2d Sess.; H. Jour. 215.

**12.** H. Doc. No. 385, 80 CONG. REC. 99.

Jan. 6, 1936, and ordered the letter printed as a House document.

Contestant alleged that certain irregularities and frauds had occurred in Mahoning County, but not in the other two counties of the district. The committee, after considering all referred testimony and hearing arguments of counsel, found—

> . . . [S]ome irregularities, from the evidence, in respect to the destruction of the ballots, tabulations of the votes cast, and the method of conducting the election in Mahoning County, still, there was no evidence whatsoever connecting the contestee with these acts. And even if the committee should disregard entirely the election in Mahoning County and cast these ballots out, still it would not affect enough votes to change the result of this election; for the reason that in the other two counties in which the voting was not impeached, the contestee received a majority of 2,000 votes (though the unimpeached votes were not a majority of all votes cast in the district).

The committee recommended the adoption of the following resolution:

> *Resolved,* That Locke Miller is not entitled to a seat in the House of Representatives of the Seventy-fourth Congress from the Nineteenth District of the State of Ohio.
>
> *Resolved,* That John G. Cooper is entitled to a seat in the House of Representatives of the Seventy-fourth Congress from the Nineteenth District of the State of Ohio.

On Mar. 13, 1936, Mr. Kerr called up as privileged House Resolution 438[13] which embodied the language recommended by the committee in its report. The previous question was immediately ordered without debate, and House Resolution 438 thereupon agreed to by voice vote. Mr. Cooper was thereby held entitled to his seat.

*Note:* Syllabi for Miller v Cooper may be found herein at § 12.2 (balloting irregularities); § 39.5 (significance of number of disputed ballots).

## § 49. Seventy-fifth Congress, 1937–38

### § 49.1 Roy v Jenks

In the contested election case of Roy v Jenks in the First Congressional District of New Hampshire the Clerk of the House transmitted the testimony, papers, and documents to the Speaker on July 21, 1937,[14] on which date the contested election was referred to the committee. These documents accompanied the Clerk's letter, which the Speaker laid before the House and ordered printed.

Mr. John H. Kerr, of North Carolina, submitted the privileged

**13.** 80 CONG. REC. 3740, 74th Cong. 2d Sess.; H. Jour. 236.

**14.** H. Doc. No. 305, 81 CONG. REC. 7339, 7352, 75th Cong. 1st Sess.; H. Jour. 756.

report (H. Rept. No. 1521)[15] from the Committee on Elections No. 3 on Aug. 13, 1937, which was referred to the House Calendar and ordered printed.

Mr. Charles W. Tobey, of New Hampshire, subsequently made a point of order against acceptance of the report by the House, in that it violated § 47 of Rule XI, which required the several elections committees of the House to make final reports to the House in all contested election cases not later than six months from the first day of the first regular session of the Congress to which the contestee was elected. (The six-month reporting requirement was changed in the 92d Congress to a direction to report "at such time as the committee considers practicable in that Congress to which contestee was elected." Rule XI clause 25, *House Rules and Manual* § 733 [1971]. This requirement was omitted from the rules in the 94th Congress.)

Mr. Gerald J. Boileau, of Wisconsin, concurred with Mr. Tobey, contending, that after the six months' period expired, the Committee on Elections lost its privilege of calling up such resolution. Mr. Arthur H. Greenwood, of Indiana, replied that the Constitution and the House rules give the House the power to decide the question of its own membership, which power would be denied should the rule be construed as mandatory. Mr. John J. O'Connor, of New York, pointed out that an elections committee which for any reason failed to report within six months could successfully deprive the House of the opportunity to decide the elections of its Members, were the rule to be construed as mandatory. Mr. Kerr argued that the federal statutes governing contested election cases give each party much longer than six months to gather evidence and present it to the House.

The Speaker,[16] in overruling the point of order, stated:[17]

> The Chair thinks it proper in the construction of this issue not only to take into consideration the verbiage of this rule but also a provision of the Constitution of the United States which has been cited in this argument. Section 5 of article I of the Constitution, in part, provides that each House shall be the judge of the elections, returns, and qualifications of its own Members.
>
> The Chair is of the opinion that although the terms of the rule are in the language read by the Chair and as argued by the gentleman from New Hampshire, yet, nevertheless, the

**15.** 81 CONG. REC. 8842, 8878, 75th Cong. 1st Sess.; H. Jour. 859, 862.

**16.** William B. Bankhead (Ala.).

**17.** 81 CONG. REC: 8845, 8846, 75th Cong. 1st Sess.

Chair must look at all the facts in the case in order to reach a decision as to what was the fair intention of the House of Representatives in the adoption of this rule. The Chair refers briefly to the various steps that are authorized under the statute in order to give the contestant and the contestee an opportunity to take evidence, to give proper notice one to the other of the procedures of the case, and to present it finally for the determination of the House of Representatives. The Chair finds on examination that under [former] sections 201, 202, 203, and 223 [now §§ 382, 383, 386, 391(a), and 393] of title II, United States Code, the contestee and the contestant are allowed no more than 6 months in which to present the evidence in the case to the House for its consideration. So that if they used, as they apparently did in this case, the time that was allowed to them by the statute . . . it would have been physically impossible as a matter of time, for the House to have had the case presented to it at all for its consideration. In this case, according to the letter filed by the Clerk of the House with the Speaker, which may be found in House Document 305, Seventy-fifth Congress, the issue was filed on July 21, 1937, and immediately referred to the Committee on Elections No. 3, and it appears to the Chair that the Committee on Elections has not been dilatory in this matter, but, upon the contrary, has exercised great diligence and dispatch in reaching its conclusion with reference to the issues involved. So that the Chair is under the impression that a fair construction of this rule, taken in connection with the constitutional rights of the contestant and the contestee, taken in connection with the fact that both parties to the issue were entitled to use more than 6 months in the preparation of their case, and, taking into consideration the fact that these issues were only presented to the committee on July 21, that a fair construction of the rule under all of the circumstances in this case would indicate that the provisions of this rule properly construed are not strictly mandatory, but directory. Otherwise, the Chair is of opinion that the contestant, or even the contestee, might be deprived not only of his constitutional privilege but under the terms of the statute in such case made and provided it would be made impossible for the issue to be properly presented to the House of Representatives for its determination.

There is one other matter that the Chair feels justified in taking into consideration in an interpretation of the rule under discussion.

It will be remembered that the rule in question was adopted in 1924, at which time Congress ordinarily did not assemble until more than 1 year had expired after the election of Members, and under that situation the 6-month rule would be within the realm of reason and give a fair opportunity to both parties to the contest to comply with its provisions and the provisions of the statutory law. Since its adoption, however, the so-called "lame duck" amendment to the Constitution has been ratified, under the provisions of which the Congress meets in regular session within 2 months after the Members are elected. The Chair is of the opinion that if this status had existed at the time the rule was adopted, that its harsh and impossible terms would never have been agreed to as a perma-

nent rule of the House of Representatives.

The contestee and the contestant having each more than 6 months under the statutes to present their case, the Chair is of opinion that under all of the circumstances the fair and reasonable and just interpretation of this rule justifies him in overruling the point of order, and the Chair does overrule the point of order.

Mr. Bertrand H. Snell, of New York, appealed from the decision of the Chair, whereupon Mr. Sam Rayburn, of Texas, moved to lay the appeal on the table, which motion was agreed to by a roll call vote of 286 yeas to 69 nays.

On Aug. 19, 1937, Mr. Kerr called up as privileged House Resolution 309,[18] which provided:

*Resolved*, That Arthur B. Jenks is not entitled to a seat in the House of Representatives in the Seventy-fifth Congress from the First Congressional District of the State of New Hampshire.

Resolved, That Alphonse Roy is entitled to a seat in the House of Representatives in the Seventy-fifth Congress from the First Congressional District of the State of New Hampshire.

House Report No. 1521 accompanied House Resolution 309. The views of the majority as presented in this report were repeated verbatim in the final committee report (H. Rept. No. 2255). Mr. Kerr obtained unanimous consent that general debate be extended for two and one-half hours, to be equally divided and controlled by himself and Mr. Charles L. Gifford, of Massachusetts, who had submitted the minority views which accompanied the committee report. Under Mr. Kerr's request, the previous question was to be considered as ordered at the conclusion of the general debate. At the conclusion of such debate, Mr. James M. Wilcox, of Florida, offered the following motion[19] to recommit House Resolution 309 to the Committee on Elections No. 3 with instructions:

. . . [T]hat this resolution be recommitted to the committee; that the committee be and hereby is authorized, empowered, and directed to take or cause to be taken the testimony of the 458 Newton residents shown by the town election records to have voted there in person on November 3, 1936, and such further testimony as the committee may consider relevant to better enable it to determine the issue raised by this case; and that the committee be authorized to expend such sums in its investigation as it may deem necessary, and report its findings and recommendations to this House at the next session of Congress.

The motion to recommit was agreed to by a roll call vote of 231 to 129.

**18.** 81 CONG. REC. 9356, 75th Cong. 1st Sess.; H. Jour. 893.

**19.** 81 CONG. REC. 9374, 75th Cong. 1st Sess.; H. Jour. 893.

On Aug. 20, 1937, Mr. William B. Cravens, of Arkansas, asked unanimous consent for the immediate consideration by the House of House Resolution 329:[20]

> *Resolved,* That the expenses of conducting the investigation authorized by the House in the contested-election case of ROY versus Jenks, incurred by the Committee on Elections No. 3, acting as a whole or by subcommittee, not to exceed $5,000, including the expenditures for the employment of experts, clerical, stenographic, and other assistants, shall be paid out of the contingent fund of the House on vouchers authorized by such committee or by any subcommittee thereof, conducting such investigation or any part thereof, signed by the chairman of the committee and approved by the Committee on Accounts.
>
> Sec. 2. *Provided,* That the committee shall during hearings in the District of Columbia use the committee stenographers of the House.

Mr. Lindsay C. Warren, of North Carolina, reserving the right to object, stated that this resolution should properly come from the Committee on Accounts. But, observing that the amount was reasonable and that the resolution was for the purpose of carrying out the mandate of the House to conduct an additional investigation, he withdrew his objection. Whereupon, the resolution was agreed to by voice vote and without further debate.

On Aug. 21, 1937, the final day of the first session of the 75th Congress, Mr. John C. Nichols, of Oklahoma, asked unanimous consent for the immediate consideration of House Resolution 339,[1] which stated as follows:

> *Resolved,* That the Committee on Elections No. 3, as a whole or by subcommittee, is authorized, pursuant to order of the House, August 18, 1937, to sit and act during the recesses of the Seventy-fifth Congress, in the District of Columbia or elsewhere, and to hold such hearings as the committee may determine in connection with the contested-election case of *Roy* v. *Jenks.* For the purpose of this resolution, the committee may require the attendance of such witnesses and the production of such books, papers, and documents, by subpena or otherwise, and to take such testimony as it deems necessary. Subpenas shall be issued under the signature of the Speaker of the House of Representatives or the chairman of said committee, and shall be served by any person designated by them or either of them. The chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee or any subcommittee thereof, willfully makes default, or who, having appeared, refuses to answer any questions pertinent to the matter herein authorized, shall be held to the pen-

**20.** 81 CONG. REC. 9501, 75th Cong. 1st Sess.; H. Jour. 914.

**1.** 81 CONG. REC. 9627, 75th Cong. 1st Sess.; H. Jour. 932.

alties provided by sections 102, 103, and 104 of the Revised Statutes of the United States, as amended (U.S.C., title 2, secs. 192, 193, and 194.)

Mr. Nichols then advised that the purpose of this resolution was to modify the authority embodied in the motion to recommit, adopted previously, so as to permit either the whole committee or a subcommittee thereof, to conduct the investigation in Newton, New Hampshire. This resolution further provided for administration of oaths and issuance of subpenas. The resolution was thereupon agreed to.

On Apr. 28, 1938, Mr. Kerr submitted the majority report from the Committee on Elections No. 3.[(2)] In that report the majority of the committee stated that they had found no evidence as a result of the investigation in Newton, New Hampshire, which changed their opinion (incorporated in H. Rept. No. 1521 which accompanied H. Res. 309). House Report No. 2255 and House Resolution 482 which it accompanied were based on three findings of fact by the majority: first, the original official returns from the Nov. 3, 1936, election having given Mr. Roy 51,370 votes and Mr. Jenks 51,920 votes, Mr. Roy on Nov. 9 applied to the secretary of state of New Hampshire for a recount, pursuant to state law making it mandatory upon that official to conduct a recount upon request of either candidate. At the recount Nov. 24, at which both parties were represented, discrepancies were found in 114 of 129 voting precincts, resulting in a net loss of 241 votes to Mr. Jenks and in a net gain of 309 to Mr. Roy, and thus a tie vote of 51,690 votes to each candidate.

Second, upon declaration of the tie vote, both candidates immediately appealed to the ballot-law commission for final determination. At the hearing of Dec. 2 and 3, both parties stipulated that they would only contest 108 ballots at the recount of the secretary of state, and thus the commission accepted the recount of all other ballots. The commission found that Mr. Roy had received 51,695 votes and Mr. Jenks 51,678 votes, giving Mr. Roy a majority of 17 votes. Thereupon Mr. Roy requested a certificate of election from the secretary of state, and Mr. Jenks notified the Governor and state council that he had obtained proof of a 34- or 36-vote discrepancy, in his favor in the town of Newton, New Hampshire, and requested that, pending in-

**2.** H. Rept. No. 2255, 83 CONG. REC. 5957, 5960, 75th Cong. 3d Sess.; H. Jour. 422.

vestigation, the election certificate be withheld. Mr. Jenks had not cited this discrepancy at the first recount or hearing, but it was considered by the committee as one of the discrepancies found in 114 of the 129 precincts upon the first recount.

Third, the state ballot-law commission granted Mr. Jenk's petition for a rehearing on Dec. 16–18, 1936, to examine the discrepancies between the election officers return and the recount of ballots in the Newton precinct. Without deciding the matter, the commission on Dec. 19 ordered a recount of the total vote, and found, pursuant thereto, that Mr. Roy had gained 7 votes, increasing his majority to 24 votes. Then, for the first time, the commission held that there were 34 votes missing in the Newton precinct box, all of which had been cast for Mr. Jenks, thereby making him the winner by 10 votes. The secretary of state thereupon issued an election certificate to Mr. Jenks. The majority declared that the issue to be decided was whether the tally sheets and check lists of the Newton precinct were to be considered the best evidence as to the number of votes cast, or whether the ballots themselves, which the committee, upon extensive testimony of the town officials responsible for preserving the ballots, had found to be preserved according to law without a "scintilla" of direct evidence to the contrary, were to be considered the best evidence. The committee placed the burden of proof upon the contestee Mr. Jenks to establish that "there were 34 votes cast for him in the Newton precinct ballot box, which were not given to him in either recount, and that these ballots by fraud or mistake were removed from this ballot box at some time before a recount of same by the Secretary of State."

Following a recitation in the report of testimony of each of the officials responsible for safeguarding the ballots in question, the committee "declined to accept the tally sheets and the check lists as the best evidence as to how many votes were cast for the contestant and the contestee in Newton precinct."

The committee report stated, at page 8, as follows:

> . . . This official return was only prima facie evidence of its correctness. This has been overcome by a mandatory recount of the Newton ballots together with all other ballots cast for Congress, which recounts disclosed that the contention of the contestee (Jenks) that he received 34 votes in Newton was not correct since the ballots cast . . . were preserved as required by law and their integrity unimpeached.

The committee accepted the recount of the Newton ballots as the best evidence of the number of votes cast, decided that Mr. Jenks was entitled to four votes from a recount of 61 other ballots, and declared Mr. Roy elected by a majority of 20 votes.

Mr. Charles L. Gifford, of Massachusetts, submitted the minority report (H. Rept. No. 2255, part 2) on May 5, 1938, the minority of the elections committee having been granted, by unanimous consent on Apr. 28, one week to file minority views. The minority declared the crucial issue to be the number of ballots cast in Newton, and found the number to be 458, the original number as shown by the official town returns and as substantiated by the additional investigation conducted by the committee as ordered by the House. They sought to substantiate this number: (1) by evidence that 720 ballots were originally sent to Newton as required by statute, but only 686 used and unused ballots were found after the recount, a loss of 34 ballots; (2) by testimony of bipartisan town election officials that 458 voters had entered the polls and been checked on the tally sheets, and their ballots had been counted and recorded on check lists; and (3) by the official recount record, which showed a constant discrepancy between the ballot box and poll lists of 34 votes, and showed that each Republican candidate had lost 34 votes by the recount, while no Democrat had lost a single vote.

The minority claimed that the ballot box, alleged to be the best evidence, had been successfully impeached during the committee investigation in Newton, where 436 voters had appeared before the committee. The minority report relied on the sworn testimony of the voters themselves and of other witnesses, including testimony to the effect that the ballots in question had not been kept in safe custody before the recount, and that the ballots had been left unguarded during the recount.

The minority therefore considered that it had been conclusively established that 458 voters did in fact enter the polls on election day and cast ballots. "Since only 424 of these ballots have ever been found since the official returns in Newton were compiled—a loss of 34 used ballots—no recount of the 424 ballots can either legally or on a basis of morality or justice be used to impeach or change the original returns on the basis of which Mr. Jenks, the contestee, is clearly entitled to his seat in this Congress." Joining Mr. Gifford in the minority report were Mr.

James W. Wadsworth, of New York, and Mr. Charles A. Wolverton, of New Jersey.

House Resolution 482 was called up as privileged[3] on June 9, 1938, and general debate thereon limited to three hours, equally divided between Mr. Kerr and Mr. Gifford by unanimous consent. During the course of the debate, Mr. John J. Nichols, of Oklahoma, called the attention of the House to the presence of the contestant, Mr. Roy, in the gallery, and was ruled out of order by the Speaker pro tempore. Mr. Jenks, the seated contestee, took the floor, though he "had not intended to," to plead that the House take "the sworn testimony of 458 people in the State of New Hampshire."[4] The three hours of debate were consumed and the previous question ordered pursuant to the unanimous consent request.

Mr. Snell demanded a division of the two propositions in the resolution. The yeas and nays were ordered, and on the first resolve clause the House voted that Mr. Jenks was not entitled to a seat, 214 yeas to 122 nays. On the second resolve clause, the House voted 227 to 109 that Mr. Roy was entitled to a seat in the House of Representatives in the 75th Congress from the First Congressional District of New Hampshire.

*Note:* Syllabi for Roy v Jenks may be found herein at § 36.9 (correctness of talley sheets); § 37.2 (ballots as best evidence); § 40.3 (burden of showing fraud, irregularity or mistake); § 41.2 (recounts permitted by state law); § 42.6 (participation of parties and debate on resolution disposing of contests); § 42.9 (extension of time for debate on resolution disposing of contests); § 42.14 (demand for division on resolution disposing of contests); § 42.15 (resolutions admitting neither candidate to a seat); §§ 43.5, 43.6 (timeliness of committee report); § 43.7 (minority reports); § 45.2 (payments from contingent fund).

### § 49.2 Rutherford v Taylor

On June 30, 1937, the Clerk of the House transmitted to the Speaker a letter[5] concerning the contested election of J. Will Taylor, Second Congressional District of Tennessee, in the 75th Congress. The letter recited that on Dec. 4, 1936, Calvin Rutherford had served notice on Mr. Taylor, the returned Member, of his pur-

**3.** 83 CONG. REC. 8642, 75th Cong. 3d Sess.; H. Jour. 641.

**4.** 83 CONG. REC. 8650, 75th Cong. 3d Sess.

**5.** H. Doc. No. 282, 81 CONG. REC. 6630, 6643, 75th Cong. 1st Sess.; H. Jour. 675, 682.

pose to contest the election of said Mr. Taylor, and that Mr. Taylor did, on Dec. 21, 1936, answer the notice of contest served upon him. The letter further recited that contestant had begun taking testimony on Jan. 27, 1937, again on Jan. 29, and finally on Apr. 27, 1937, but that no further testimony had been adduced, despite contestee's requests that contestant complete his case within the 90 days permitted by 2 USC § 203. Contestee claimed that he was entitled to reimbursement for legal expenses as permitted by 2 USC § 226.

Contestant claimed in his notice of contest (1) that certain election boards had willfully refused to place his name on official ballots; (2) that contestee had procured such conduct by the election officials; and (3) that contestee had, during the primary election of Aug. 6, 1936, purchased tax receipts of voters in order to influence their vote in November. Contestee's demurrer and answer specifically denied each allegation of the notice of contest and further demonstrated that, even where contestant's claim that his name had been left off ballots in four counties substantiated, and had contestant received all the votes in those counties, contestee would nevertheless have won the election by a majority of 11,566. The final total showed that contestee had received 40,527 votes; his opponent, Mr. O'Conner, 39,080 votes, and Mr. Rutherford, 220 votes.

The Clerk's letter, which contained copies of the notice and answer, as well as transcripts of all testimony, advised that the contest had abated. This letter was referred by the Speaker to the Committee on Elections No. 1 on June 30, 1937, and ordered printed with accompanying papers as a House document (H. Doc. No. 282).

*Note:* Syllabi for Rutherford v Taylor may be found herein at § 43.11 (effect of contestant's withdrawal or abandonment of contest); § 45.6 (reimbursement request where contest has abated).

### § 49.3 Williams v Maas

On Mar. 30, 1937, the Clerk of the House wrote a letter[6] to the Speaker concerning the contested election case brought by Howard Y. Williams against Melvin J. Maas in the Fourth Congressional District of Minnesota. The letter stated that during the time allowed by law for the taking of testimony, the Clerk had received a

**6.** H. Doc. No. 182, 81 CONG. REC. 2901, 75th Cong. 1st Sess.; H. Jour. 341.

statement from the contestant, Mr. Williams, dated Feb. 27, 1937, withdrawing the contest and asking that it be dismissed. The notice of withdrawal was referred to the Committee on Elections No. 1 on Mar. 30, 1937, and ordered printed by the Speaker as part of the Clerk's letter.

There is no record that the House took further action in this contest, or that the Committee on Elections No. 1 reported thereon.

*Note:* Syllabi for Williams v Maas may be found herein at § 33.4 (manner of withdrawal from contests).

## § 50. Seventy-sixth Congress, 1939–40

### § 50.1 Neal v Kefauver

On Mar. 1, 1940, the Clerk of the House transmitted to the Speaker a communication[7] explaining that his office had unofficial knowledge of a contested election having been initiated as a result of the special election held Sept. 13, 1939, to fill the vacancy in the Third Congressional District of Tennessee. On Oct. 19, 1939, John R. Neal had served notice on the returned Member of his purpose to contest the election of Estes Kefauver (returned Member). Mr. Kefauver sent a communication to the Clerk on Feb. 23, 1940, asking that the contest be dismissed and setting forth the reasons therefor. The Clerk's communication related that no testimony in behalf of either party had been filed with his office, and that the time prescribed by the law governing contested election cases for submitting such testimony had expired.

The communication from the Clerk and Mr. Kefauver's motion to dismiss the contest, contained therein, were received by the Speaker and laid before the House on Mar. 1, 1940, and referred on that date to the Committee on Elections No. 1, and ordered printed as a House document.

Mr. Charles J. Bell, of Missouri, submitted the unanimous report[8] from the Committee on Elections No. 1 to accompany House Resolution 534,[9] which—

> *Resolved,* That John R. Neal is not entitled to a seat in the House of Representatives of the Seventy-sixth Congress from the Third Congressional District of Tennessee.
>
> *Resolved,* That Estes Kefauver is entitled to a seat in the House of Rep-

7. H. Doc. No. 645, 85 CONG. REC. 2202, 76th Cong. 2d Sess.; H. Jour. 207.

8. H. Rept. No. 2609, 85 CONG. REC. 8535, 8563, 76th Cong. 2d Sess.; H. Jour. 684.

9. H. Jour. 684.

resentatives of the Seventy-sixth Congress from the Third Congressional District of the State of Tennessee.

The report stated that the committee had dismissed the contest and noted that:

> [T]he contestant had failed to take the evidence, as he was required to do by law; and there was no evidence before the committee of the matters charged in his notice of contest, and no briefs filed, as provided by law. The contestant was notified to appear in person but did not do so. For these laches the committee dismissed the contest and recommended the adoption of House Resolution 534.

House Resolution 534 was referred to the House Calendar on June 18,1940, the same day that the above report (H. Rept. No. 2609) was submitted. The House did not take any action on the resolution during the 76th Congress.

*Note:* Syllabi for Neal v Kefauver may be found herein at § 5.5 (committee power to dismiss contest); § 16.1 (laches); § 25.3 (failure to produce evidence); § 42.19 (failure to take action on reported resolutions).

### § 50.2 Scott v Eaton

On Mar. 14, 1940, Mr. Joseph A. Gavagan, of New York, submitted the unanimous report [10] of the Committee on Elections No. 2 in the contested election case brought by Byron N. Scott against Thomas M. Eaton in the 18th Congressional District of California. On Jan. 3, 1940, the first day of the third session of the 76th Congress, the Clerk of the House transmitted to the Speaker the papers and original testimony to accompany his letter,[11] which were laid before the House and referred by the Speaker on that day to the Committee on Elections No. 2, and the Clerk's letter ordered printed as a House document. The official tabulation of votes showed that contestee Eaton had received 52,216 votes to 51,874 votes for contestant, a majority of 342 votes. Contestant filed notice of contest on Dec. 24, 1938 (contesting the Nov. 8, 1938, election), with timely answer by contestee.

The committee considered only three issues raised by the pleadings:

(1) Whether contestee violated the California Corrupt Practices Act;

(2) Whether contestee violated the Federal Corrupt Practices Act;

(3) Whether any such violation directly or indirectly prevented contestant from receiving a majority of the votes cast.

**10.** H. Rept. No. 1783, 86 CONG. REC. 2915, 2916, 76th Cong. 3d Sess.; H. Jour. 246.

**11.** H. Doc. No. 539, 86 CONG. REC. 6, 76th Cong. 3d Sess.; H. Jour. 51.

Without specifically setting forth the evidence and testimony as to any of the above issues, the committee reported that contestant had not sustained his burden of proof, which was to establish by "a fair preponderance of evidence the issues raised by the pleadings."

The committee report recommended adoption of House Resolution 427,[12] which was called up as privileged by Mr. Gavagan and agreed to by voice vote and without debate on Mar. 29, 1940. The resolution—

> *Resolved,* That Byron N. Scott was not elected a Member from the Eighteenth Congressional District of the State of California to the House of Representatives at the general election held November 8, 1938; and
>
> *Resolved,* That Thomas M. Eaton was elected a Member from the Eighteenth Congressional District of the State of California to the House of Representatives at the general election held on November 8, 1938.

*Note:* Syllabi for Scott v Eaton may be found herein at § 35.2 (standard of "fair preponderance of evidence").

### § 50.3 Smith v Polk

On Mar. 15, 1939, the Speaker laid before the House a communication[13] from the Clerk of the House informing the House that he had, on Mar. 4, 1939, received a letter from the contestant, Emory F. Smith, withdrawing the contest which he had instituted under the contested election statutes against the seated Member from the Sixth Congressional District of Ohio, James G. Polk. Contestant's letter asked that the contest be dismissed by the House. The communication, together with the accompanying papers, was referred to the Committee on Elections No. 3, and ordered printed as a House document.

Contestant's letter to the Clerk related that contestee had been certified as elected by 799 votes, but that contestant had filed a petition in the Supreme Court of Ohio under sections 4785–166 to 4785–174 of the General Code of Ohio alleging that he had received the greater number of valid votes in the whole district (fraudulent votes having been cast for contestee in a certain county), and asking the court to cancel the certificate of election of contestee and to issue a certificate to him. Contestee's demurrer to this petition was sustained upon the grounds that the provisions of the Ohio code under which the petition had been filed were invalid as in contravention of article I, section 5 of the Constitution of the

12. 86 CONG. REC. 3696, 76th Cong. 3d Sess., H. Jour. 290.

13. H. Doc. No. 207, 84 CONG. REC. 2761, 2762, 76th Cong. 1st Sess.; H. Jour. 341.

United States which prescribed that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Contestant claimed that depositions in support of his contentions were not filed with the House for the reason that he was awaiting the decision of the Ohio Supreme Court on the demurrer, which decision was made on Feb. 8, 1939. After that date, contestant decided that he would withdraw and dismiss his notice of contest due to the expense of obtaining evidence and to the difficulty in obtaining a favorable determination from an elections committee, the majority of which represented members from another political party.

On Apr. 10, 1939, Mr. Albert Thomas, of Texas, submitted the unanimous report[14] from the Committee on Elections No. 3 which recited that fact that contestant had withdrawn the contest and which recommended the following resolution:

> *Resolved,* That the Honorable James G. Polk was duly elected as Representative from the Sixth Congressional District of the State of Ohio to the Seventy-sixth Congress and is entitled to his seat.

On the same day, Mr. Thomas called up House Resolution 156[15] which incorporated the language recommended in the report. The resolution was agreed to by the House without debate and by voice vote. Contestee was thereby held entitled to his seat.

*Note:* Syllabi for Smith v Polk may be found herein at §§ 33.5, 33.6 (manner of withdrawal from contests); § 43.10 (effect of contestant's withdrawal or abandonment of contest).

### § 50.4 Swanson v Harrington

On Mar. 11, 1940, Mr. Albert Thomas, of Texas, submitted the report[16] of the Committee on Elections No. 3 in the contested election case of Albert F. Swanson against Vincent F. Harrington in the Ninth Congressional District of Iowa. The Clerk of the House had, on Jan. 3, 1940, the opening day of the third session, transmitted to the Speaker pro tempore the papers, documents, and testimony, which were referred to the Committee on Elections No. 3 on that day by the Speaker, with the Clerk's letter.[17]

The official tabulation of returns as certified by the state canvassing board showed that the

**14.** H. Rept. No. 392, 84 CONG. REC. 4040, 76th Cong. 1st Sess.; H. Jour. 437.

**15.** *Id.*

**16.** H. Rept. No. 1722, 86 CONG. REC. 2689, 76th Cong. 3d Sess.; H. Jour. 233.

**17.** H. Doc. No. 540, 86 CONG. REC. 6, 76th Cong. 3d Sess.; H. Jour. 51.

contestee, Mr. Harrington, had received 46,705 votes and that contestant, Mr. Swanson, had received 46,366 votes, resulting in a majority of 339 votes for Mr. Harrington.

Contestant served notice of contest on Dec. 24, 1938, alleging, in 52 counts, misconduct, fraud, and illegality. Contestee's answer of Jan. 23, 1939, was in the form of a 52-count general denial.

Contestant's first claim, that 70 of the 528 votes cast in a certain precinct were illegal as they were cast by Works Progress Administration workers only temporarily in the district, was upheld; the committee ruled, however, that such votes if disregarded would not affect the outcome of the election in the whole district.

Contestant also claimed that the House should require a recount of the total vote, citing an informal recount he had taken in connection with a state recount for a local sheriff's office which allegedly indicated that contestant would be shown to have a plurality of five votes. The committee found that contestant had not exhausted his remedy of obtaining a recount through the state courts, as permitted by the Iowa code, prior to appealing to the committee to itself order a recount. The committee rejected contestant's argument that he had been precluded from invoking state court aid as the state courts had not construed the relevant state election contest laws as they applied to House seats. Contestant, the committee reasoned, should not be permitted to substitute his own construction of state law for that of the state courts. The committee found that contestant had not exhausted state court remedies while acknowledging, at the same time, the power of the House committee to order a recount in its discretion without reference to state proceedings.

In relation to contestant's second claim, the committee determined the central issue to be whether the contestant could show, by a preponderance of the evidence, that an application for a recount was justified due to fraud or irregularity. The committee cited several precedents to establish that an application for a recount must be founded upon proof sufficient to raise at least a presumption of irregularity or fraud, and that a recount will not be ordered upon the mere suggestion of possible error.

The committee report considered the fundamental issue to be decided:

> . . . [W]hether or not contestant has borne the burden of showing that, due

to fraud and irregularity, the result of the election was contrary to the clearly defined wish of the constituency involved. The committee is of the opinion that contestant has failed to carry this burden.

The report cited Bailey v Walters (6 Cannon's Precedents § 166) in affirmation of the proposition that "the House will not erect itself nor will it erect its committees as mere boards of recount."

The committee found that contestant had not shown fraud or irregularity sufficient to compel a recount. The committee considered and rejected the informal recount taken by contestant in Woodbury County in connection with an official local election recount taken thereby which the candidates of the opposing political party had increased, rather than decreased, their vote totals.

Mr. Thomas called up House Resolution 419 [18] as privileged on Mar. 11, 1940, the same day the committee submitted its report. Without debate and by voice vote, the House agreed to the resolution recommended in the committee report that—

*Resolved,* That Albert F. Swanson is not entitled to a seat in the House of Representatives in the Seventy-sixth Congress from the Ninth Congressional District of Iowa.

*Resolved,* That Vincent F. Harrington is entitled to a seat in the House of Representatives in the Seventy-sixth Congress from the Ninth Congressional District of Iowa.

*Note:* Syllabi for Swanson v Harrington may be found herein at § 12.3 (balloting irregularities); § 13.4 (failure to exhaust state remedy); § 40.1 (justification for recount of ballots); § 41.1 (exhaustion of state remedies).

## § 51. Seventy-seventh Congress, 1941–42

### § 51.1 Miller v Kirwan

On Jan. 10, 1941, John W. McCormack, of Massachusetts, the Majority Leader, called up as privileged the following resolution (H. Res. 54): [19]

Whereas Locke Miller, a resident of the city of Youngstown, Ohio, in the Nineteenth Congressional District thereof, has served notice of contest upon Michael J. Kirwan, the returned Member of the House from said district of his purpose to contest the election of said Michael J. Kirwan; and

Whereas it does not appear that said Locke Miller was a candidate for election to the House of Representatives

18. 86 Cong. Rec. 2662, 76th Cong. 3d Sess.; H. Jour. 230.

19. 87 Cong. Rec. 101, 77th Cong. 1st Sess.; H. Jour. 55.

*from the Nineteenth Congressional District of the State of Ohio, at the election held November 5, 1940, but was a candidate for the Democratic nomination from said district at the primary election held in said district, at which Michael J. Kirwan was chosen as the Democratic nominee: Therefore be it*

*Resolved,* That the House of Representatives does not regard the said Locke Miller as a person competent to bring a contest for a seat in the House and his notice of contest, served upon the sitting Member, Michael J. Kirwan, is hereby dismissed; and no petition or other paper relating to the subject matter contained in this resolution shall be received by the House, or entertained in any way whatever.

The resolution was thereupon agreed to without debate and by voice vote by the House. Thus the House dismissed the contest without the contest having been referred to the Committee on House Administration, and therefore without committee action and consideration.

*Note:* Syllabi for Miller v Kirwan may be found herein at §§ 4.4, 4.5 (House power of summary dismissal of election contests); § 19.4 (contestants as candidates in general election); § 42.4 (resolution disposing of contest as privileged); § 44.2 (form of resolution disposing of contest).

## § 52. Seventy-eighth Congress, 1943–44

### § 52.1 Clark v Nichols

On May 11, 1943, the Speaker laid before the House a communication from the Clerk of the House[20] which notified the House of the pending election contest between E. O. Clark, contestant, and Jack Nichols, contestee, from the Second Congressional District of Oklahoma. It related that contestant had, on Dec. 5, 1942, notified contestee of his intention to contest his election of Nov. 3, 1942, and that contestee had filed timely answer thereto. Enclosed with it was a letter from contestee asking the House to prevent contestant from further proceeding in the contest, as contestant had not complied with the requirement that testimony taken for contestant be forwarded to the Clerk of the House within the 30 days (based on the former statute, 2 USC § 223, now 2 USC § 231). The Clerk's communication was referred on May 11, 1943, to the Committee on Elections No. 3 with accompanying papers and ordered printed as a House document.

**20.** H. Doc. No. 201, 89 CONG. REC. 4243, 4244, 78th Cong. 1st Sess.; H. Jour. 319.

Mr. Hugh Peterson, of Georgia, submitted the committee report,[1] which was unanimous, on Feb. 15, 1944. The report did not consider contestee's request that contestant be barred from continuing the contest. Rather, the committee recommended that the contest be dismissed for failure of contestant to bear "the burden of showing that, due to *fraud and irregularity,* the result of the election was contrary to the clearly defined wish of the constituency involved [emphasis supplied]." The committee determined that no fraud had been perpetrated by any election official whereby contestant was deprived of votes.

The committee determined that contestant had proven certain irregularities relating to the failure of local officials in certain precincts to keep registration books and to comply with certain other administrative requirements imposed by state law. Contestee offered no testimony to rebut this evidence. Nevertheless, the committee determined that such irregularities would not vitiate the election unless the procedures involved were declared by law to be essential to the validity of the election. As the pertinent state law did not contain such provisions, the committee regarded the state bookkeeping requirements as merely directory, and held that the committee could not void what it considered the certain decision of the electorate because of "the failure of those responsible for the administration of the law to do their duty."

The committee stated in its report that "the precedents are uniform in holding that the returns which are made by election officials regularly appointed by the laws of the State where the election is held are presumed to be correct until they are impeached by proof of irregularity and fraud."

On Feb. 16, 1944, Mr. Peterson called up as privileged House Resolution 440[2] which the House agreed to without debate and by voice vote, and which—

> *Resolved,* That the election contest of E. O. Clark, contestant, against, Jack Nichols, contestee, Second Congressional District of the State of Oklahoma, be dismissed.

In his extension of remarks in the *Congressional Record* at that point, Mr. Ross Rizley, of Oklahoma, discussed in detail the alleged irregularities which contestant had referred to in the evi-

**1.** H. Rept. No. 1120, 90 CONG. REC. 1675, 78th Cong. 2d Sess.; H. Jour. 117.

**2.** 90 CONG. REC. 1761–63, 78th Cong. 2d Sess.; H. Jour. 121.

dence he presented. He cited two House election cases [Bisbee v Finley (2 Hinds' Precedents § 980) and Benoit v Boatner (1 Hinds' Precedents § 340)] for the proposition that elections held in disregard of registration laws are to be considered void, regardless of whether such registration laws are to be considered directory or are made mandatory by statute. Mr. Rizley considered the evidence which was introduced by contestant and which as not contradicted by contestee——

> . . . [S]ufficient to warrant the investigation of an election in which the contestee as the candidate of the political party which had control and charge of the election, claims to have been elected in a congressional district by only approximately 385 votes. This would seem especially true where a State election board dominated by the same political party denied itself jurisdiction and by so doing suggested that the House should set itself up as a recount committee.

and where the House, in turn——

> . . . [S]ays that it cannot erect itself as a recount board . . . that there were "gross irregularities" and flagrant violations of the election laws, "fairly proven by the contestant."[3]

*Note:* Syllabi for Clark v Nichols may be found herein at § 6.1 (items transmitted by Clerk); § 10.11 (distinction between mandatory and directory state laws); § 27.6 (failure to forward testimony to Clerk); § 35.4 (burden of showing results of election would be changed); § 36.3 (official returns as presumptively correct).

### § 52.2 McEvoy v Peterson

On May 5, 1944, Mr. Ed L. Gossett, of Texas, submitted the report[4] from the Committee on Elections No. 2 in the contested election case brought by Edward T. McEvoy against Hugh Peterson, from the First Congressional District of Georgia. The case had been referred to the committee on Sept. 20, 1943, when the Speaker laid before the House a letter from the Clerk of the House[5] transmitting the necessary papers and documents as required by the statute governing contested election cases. This letter was ordered printed as a House document.

The unanimous committee report, which accompanied House Resolution 534, recommended that the election contest be dismissed. The report related that contestant (Mr. McEvoy) had attempted to run for the First Congressional District of Georgia seat as an

3. *Id.* at p. 1763.

4. H. Rept. No. 1423, 90 CONG. REC. 4087, 78th Cong. 2d Sess.; H. Jour. 288.

5. 89 CONG. REC. 7682, 78th Cong. 1st Sess.; H. Jour. 607.

independent Republican though there was no such political party in Georgia, and that contestant's name had not appeared on any ballots and that he had not received any votes. The committee further found that contestant had failed to exhaust available state legal remedies, had not filed the election contest in good faith, and had failed to make out a prima facie case. The committee disallowed contestant's petition for reimbursement of expenses.

House Resolution 534 was called up as privileged[6] by Mr. Gossett and agreed to without debate on May 5, 1944. Thereby the House dismissed the election contest by voice vote. The resolution provided—

> *Resolved*, That the election contest of Edward T. McEvoy, contestant, against Hugh Peterson, contestee, First Congressional District of the State of Georgia, be dismissed.

*Note:* Syllabi for McEvoy v Peterson may be found herein at § 13.1 (permissible defenses to election contests); § 14.1 (contestant's standing); § 45.7 (payments conditioned on good faith in filing of contest).

### § 52.3 Moreland v Schuetz

On Feb. 17, 1944, Mr. Hugh Peterson, of Georgia, from the Committee on Elections No. 1 submitted the final report[7] in the contested election case brought by James C. Moreland against Leonard W. Schuetz from the Seventh Congressional District of Illinois. The case had been initiated in the House on Nov. 15, 1943, at which time a letter from the Clerk of the House[8] had been laid before the House by the Speaker and referred by him to the committee.

On Mar. 1, 1943, the Speaker had laid before the House, during the period permitted by statute for taking of testimony for an election contest, a letter from the Clerk.[9] This letter conveyed contestant's request that the House grant him additional time for taking testimony so as to permit him to substantiate his claim of certain voting irregularities and miscounts which would change the 1,975-vote margin of contestee to contestant's favor.

Specifically, contestant claimed that ballots which had been counted for contestee (more than 2,000) should be totally voided, as such

**6.** 90 CONG. REC. 4074, 78th Cong. 2d Sess.; H. Jour. 288.

**7.** H. Rept. No. 1158, 90 CONG. REC. 1833, 1834, 78th Cong. 2d Sess.; H. Jour. 132.

**8.** H. Doc. No. 357, 89 CONG. REC. 9529, 78th Cong. 1st Sess.; H. Jour. 731.

**9.** H. Doc. No. 120, 89 CONG. REC. 1456, 78th Cong. 1st Sess.; H. Jour. 134, 136.

ballots had been illegally marked by write-in attempts to vote for certain local judicial candidates in contravention of state law. Contestant also alleged error by election officials in that they failed to credit him with "split-ticket" ballots, bearing votes cast for him, and that they counted such ballots as "straight-ticket" ballots for the Democratic party and, therefore, for contestee. Contestant asked for an extension of time to establish these allegations, which he could not do in the time required by law, as the time and facilities of the responsible election officials was then being totally consumed in preparation for local elections.

Mr. Peterson submitted House Report No. 345[10] on Apr. 6, 1943, to accompany House Resolution 201,[11] which was agreed to without debate on that date, and which extended time for taking testimony for a total of 65 days. The report unanimously agreed that the circumstances as cited above by contestant set forth "good cause" as required by House precedents cited in the report.

The resolution recommended in the committee report was agreed to by the House as follows:

> *Resolved,* That the time allowed for taking testimony in the election contest, James C. Moreland, contestant, against Leonard W. Schuetz, contestee, Seventh Congressional District of Illinois, shall be extended for a period of 65 days, beginning April 12, 1943, and the testimony shall be taken in the following order:
>
> The contestant shall take testimony during the first 30 days, the contestee shall take the testimony during the succeeding 30 days, and the contestant shall take testimony in rebuttal only during the remaining 5 days of said period.

After the extension of time, the final committee report related that the parties to the contest had agreed to conduct a recount in those wards where the vote had been questioned by contestant. This recount, which was terminated by contestant prior to expiration of his time for taking additional testimony, covered 42 percent of total votes cast and included over 56 percent of the votes cast for contestee. The committee found that the recount reduced contestee's majority by 898 votes, an insufficient number to change the outcome, and that contestant had not sustained the burden of proving, from this partial recount in precincts where contestee had received a heavy vote, that a recount of all votes would establish a majority for contestant. Thus, the committee concluded that the contestant had not introduced sufficient evidence to warrant a complete recount.

**10.** 89 CONG. REC. 3024, 78th Cong. 1st Sess.; H. Jour. 219.

**11.** *Id.* at p. 2982.

The committee report made reference to such errors as improper initialing of ballots by election holders, improper marking of ballots, failure of election holders to initial ballots, spoilation of ballots, etc., but said:

> There is no evidence whatsoever of fraud on the part of the election officials. So, it is evident that this condition was general and prevailed among all of the ballots cast and it can, therefore, be seen that the gains made by the contestant in the partial review or recount which included only 42 percent of the total ballots cast, but which included at the same time over 56 percent of the ballots cast for the contestee, is by no means conclusive proof that the trend of the change as shown by the recount in favor of the contestant would have continued throughout the recount of all the remainder of the ballots.
>
> [Whether] the contestant desired to recount all of the ballots cast in this election for the purpose of securing evidence to submit in support of his contest, he did not exhaust the remedy afforded him for such a recount.
>
> It is the duty of the contestant to produce evidence sufficient to support the allegations set forth in his petition, and, as this committee has heretofore held, it is not the duty of this committee to take upon itself the obligation of securing evidence for either party.

Mr. Peterson called up as privileged House Resolution 444,[12] on the same day he submitted the report of the Committee on Elections No. 3 for printing in the Record. House Resolution 444 was agreed to by the House without debate and by voice vote, and it—

> *Resolved*, That the election contest of James C. Moreland, contestant, against Leonard W. Schuetz, contestee, Seventh Congressional District of the State of Illinois, be dismissed.

*Note:* Syllabi for Moreland v Schuetz may be found herein at § 6.3 (items transmitted by Clerk); § 27.10 (extensions of time for taking testimony); § 27.11 (extensions of time for good cause); § 39.1 (recount by stipulation of parties); § 40.5 (burden of proving recount would change election result); § 43.4 (resolution accompanying report).

### § 52.4 Schafer v Wasielewski

On Mar. 29, 1944, Mr. James Domengeaux, of Louisiana, submitted the unanimous report[13] of the Committee on Elections No. 1 in the contested election case of John C. Schafer against Thaddeus F. Wasielewski, from the Fourth Congressional District of Wisconsin. The case had come to the House pursuant to the provisions of the federal statute (see 2 USC §§ 381 et seq.), governing election

**12.** 90 CONG REC. 1834, 78th Cong. 2d Sess., Feb. 17, 1944; H. Jour. 127.

**13.** 90 CONG. REC. 3252, 78th Cong. 2d Sess.; H. Jour. 227.

contests on Sept. 20, 1943, when the Speaker laid before the House a letter from the Clerk[14] transmitting the necessary testimony and documents. The letter was referred to the committee on that date and ordered printed by the Speaker.

The contestant, defeated in the election by contestee by approximately 17,000 votes, alleged that contestee had himself expended more money during his campaign than was permitted by the Federal Corrupt Practices Act and by the election laws of Wisconsin and that contestee had failed to file correct reports of expenditures as required by law. As stated in the report, "the Wisconsin statutes limit to $875 the amount of money that can be spent by a candidate for Congress in the general election. The Wisconsin statutes, however, place no limitation upon receipts and expenditures of individuals or groups that might voluntarily interest themselves in behalf of a candidate."

The Federal Corrupt Practices Act (2 USC § 248) requires:

> (a) A candidate, in his campaign for election, shall not make expenditures in excess of the amount which he may lawfully make under the laws of the State in which he is a candidate, not in excess of the amount which he may lawfully make under the provisions of this title ($2,500).

As further stated in the report—

> Thaddeus F. Wasielewski filed with the Clerk of the House of Representatives on November 5, 1942, a statement, as required by Federal law, showing receipts of $1,689 and total expenditures of $1,172.

The committee determined that the expense reports filed by contestee had disclosed on their face, figures in excess of amounts permitted by state law and by the Federal Corrupt Practices Act. The committee found, however, that certain sums listed actually represented expenditures of a "voluntary committee" rather than expenditures of a "personal campaign committee" as defined by state law, and were, therefore, not to be considered personal expenditures of contestee, and, thus, not limited by state law.

The committee also determined that it should not deprive contestee of his seat as a result of his negligence in preparing expenditure accounts filed with the Clerk. The committee found no evidence of fraud.

Immediately upon submission of the committee report (H. Rept. No. 1308), Mr. Domengeaux called up as privileged House Resolution

**14.** H. Doc. No. 282, 89 CONG. REC. 7682, 78th Cong. 1st Sess.; H. Jour. 607.

490,[15] which was agreed to by the House without debate and by voice vote, and which—

> *Resolved*, That the election contest of John C. Schafer, contestant, against Thaddeus F. Wasielewski, contestee, Fourth Congressional District of the State of Wisconsin, be dismissed.

*Note:* Syllabi for Schafer v Wasielewski may be found herein at §§ 10.1, 10.3 (Corrupt Practices Act).

### § 52.5 Sullivan v Miller

On Jan. 25, 1943, the Speaker laid before the House a letter[16] from the Clerk of the House, relating that his office had unofficial knowledge that the election held on Nov. 3, 1942, for a House seat from the 11th Congressional District of Missouri was being contested. On Dec. 9, 1942, contestant John B. Sullivan served notice of intention to contest the election on contestee Louis E. Miller, with answer by contestee on Dec. 28, 1942, from which date the time for taking testimony under the statute (2 USC § 203) began to run. The Clerk's letter related that on Jan. 20, 1943, the parties had filed a joint application proposing that the House order the Missouri Board of Election Commissioners to conduct a recount. The Clerk's letter, accompanied by the joint letter signed by the parties to the contest and by drafts of resolutions ordering the recount and extending time for taking testimony, together with depositions in support thereof taken of members of the Board of Election Commissioners in St. Louis, and accompanied by contestant's charts showing recapitulation of all votes cast in the district, were referred to the Committee on Elections No. 3 on Jan. 25 and "ordered printed with an illustration," as a House document.

The parties' application for a recount and accompanying supporting documents alleged that a state recount which had been conducted in a local election for Recorder, where those candidates had been on the same ballot as the parties in this case, indicated a miscount of 1,385 votes. On Feb. 25, 1943, Mr. Hugh Peterson, of Georgia, submitted a report,[17] which was unanimous, to accompany House Resolution 137,[18] which Mr. Peterson called up as

**15.** 90 CONG. REC. 3253, 78th Cong. 2d Sess.; H. Jour. 227.

**16.** H. Doc. No. 58, 89 CONG. REC. 368, 369, 78th Cong. 1st Sess.; H. Jour. 67.

**17.** H. Rept. No. 180 (joint application for recount not granted), 89 CONG. REC. 1353, 78th Cong. 1st Sess.; H. Jour. 129.

**18.** 89 CONG. REC. 1324, 78th Cong. 1st Sess.; H. Jour. 129.

privileged on that date. The report stated that no election contest had been formally presented to the House at that time, and there was thus no contest pending before the Committee on Elections, nor did this filing of a joint application for recount constitute such a presentation. The report recommended, therefore, that the House should not "intervene in an election contest that has been initiated but has not been brought officially to the House of Representatives simply for the purpose of procuring evidence for the use of the parties to the contest." The report expressed no opinion as to whether a recount of the ballots should be made in the event that an election contest was properly brought before the House. The report stated—

> It appears to the committee that the parties to this application could bring or might have brought this election contest to the House of Representatives in the manner prescribed by law and the House of Representatives could then itself determine whether or not it desired to recount the ballots.

The committee report stated that there was no precedent in the House whereby the House had ordered a state or local board of election commissioners to take a recount. The report distinguished cases cited in the joint application brief where recounts were made by the House itself through an elections committee.

In the brief debate in the House on House Resolution 137, Mr. Charles A. Plumley, of Vermont, stated that the Committee on Elections, by its unanimous report, would establish—

> . . . [T]he fact, the law, and a precedent for all time that jurisdiction of an alleged contested-election case cannot be conferred on the House or on one of its committees by any joint agreement of parties to an alleged election contest unofficially or otherwise submitted.

House Resolution 137 was thereupon agreed to without further debate and by voice vote, and it—

> *Resolved,* That the joint application for order of recount of John B. Sullivan, contestant, against Louis E. Miller, contestee, Eleventh District of Missouri, be not granted.

On Mar. 2, 1943, the Speaker laid before the House a letter (19) from the Clerk of the House transmitting contestant's application for an extension of time for taking testimony, which request was based upon time consumed by both parties in preparing their joint application for order of recount and supporting papers thereto. Contestant asked for 40

**19.** H. Doc. No. 122, 89 CONG. REC. 1473, 78th Cong. 1st Sess.; H. Jour. 137, 138.

additional days in which to prepare his testimony, and for 40 days thereafter for contestee to take testimony. The Clerk's letter was referred to the Committee on Elections No. 3 and ordered printed with accompanying papers (contestant's application) by the Speaker as a House document.

On May 17, 1943, Mr. Peterson submitted the unanimous committee report[20] which recommended that each party be given a 30-day extension of time for taking testimony, with an additional five days for contestant to compile rebuttal testimony. The report reviewed and affirmed six House contested election precedents wherein the House had determined that extensions of time for taking testimony are to be permitted "for good and sufficient reason only." Upon submission of the report, Mr. Peterson called up as privileged House Resolution 240,[1] which was agreed to without debate and by voice vote and which adopted the following committee recommendation:

> *Resolved,* That the time allowed for taking testimony in the election contest, John B. Sullivan, contestant, against Louis E. Miller, contestee, Eleventh Congressional District of Missouri, shall be extended for a period of 65 days, beginning May 18, 1943, and the testimony shall be taken in the following order:
>
> The contestant shall take testimony during the first 30 days, the contestee shall take testimony during the succeeding 30 days, and the contestant shall take testimony in rebuttal only during the remaining 5 days of said period.

On Nov. 24, 1943, Mr. Peterson submitted the unanimous final report[2] from the Committee on Elections No. 3, which accompanied House Resolution 368, with the recommendation that the contest be dismissed. The report related that the parties had, between the time their joint application for recount had been denied and the time the House had granted the extension of time for taking testimony, agreed to conduct their own recount. The results of this informal recount were determined on May 4, 1943, and they showed that contestee had received a majority of all votes cast, regardless of certain changes in the vote. Thus, both parties had "entered into a stipulation in which the contestant agreed that his pending election contest be dismissed and the contestee

**20.** H. Rept. No. 454, 89 CONG. REC. 4562, 78th Cong. 1st Sess.; H. Jour. 328.

**1.** 89 CONG. REC. 4529, 78th Cong. 1st Sess.; H. Jour. 328.

**2.** H. Rept. No. 887, 89 CONG. REC. 9975, 78th Cong. 1st Sess.; H. Jour. 757.

agreed that his pending counter election contest be dismissed."

House Resolution 368[3] was called up as privileged by Mr. Peterson on Nov. 24, 1943, and agreed to without debate and by voice vote. The resolution provided—

> *Resolved*, That the election contest of John B. Sullivan, contestant, against Louis E. Miller, contestee, Eleventh Congressional District of Missouri, be dismissed.

*Note:* Syllabi for Sullivan v Miller may be found herein at § 3.1 (House lacking authority over state or local election boards); § 3.2 (intervention by House in state or local elections); § 4.1 (notice of contest as basis for House jurisdiction); § 6.9 (items transmitted by Clerk); § 18.2 (compliance with statutory requisites); § 27.12 (extensions of time for good cause); § 39.2 (recount by stipulation of parties); § 41.4 (joint applications for recount); § 42.10 (disposal by stipulation of parties).

## § 52.6 Thill v McMurray

On Jan. 31, 1944, Mr. Hugh Peterson, of Georgia, submitted the unanimous report[4] of the Committee on Elections No. 3 in the contested election case brought by Lewis D. Thill against Howard J. McMurray from the Fifth Congressional District of Wisconsin. The contest had been first brought to the attention of the House, when, on Sept. 20, 1943, the Speaker laid before the House a letter from the Clerk[5] transmitting the required testimony and documents. The Speaker had referred the communication and accompanying papers to the committee, and had ordered it printed as a House document.

Contestant claimed that contestee, who had been elected by a majority of 6,000 votes, had received contributions and made expenditures in violation of the Federal Corrupt Practices Act and of Wisconsin law by filing incorrect statements of expenditures and contributions.

Contestee had filed statements with state officials showing no personal contributions or expenditures and showing about $8,000 "voluntary committee" contributions. This was consistent with the state statute. As stated in the report—

> The Wisconsin statutes limit to $875 the amount of money that can be spent

3. 89 CONG. REC. 9974, 78th Cong. 1st Sess.; H. Jour. 756.

4. H. Rept. No. 1032, 90 CONG. REC. 962, 78th Cong. 2d Sess.; H. Jour. 66.

5. H. Doc. No. 284, 89 CONG. REC. 7683, 78th Cong. 1st Sess.; H. Jour. 607.

by a candidate for Congress in the general election. The Wisconsin statutes, however, place no limitation upon receipts and expenditures of individuals or groups that might voluntarily interest themselves in behalf of a candidate.

Contestant alleged that contestee's statement filed with the Clerk of the House as required by federal law listed sizable personal contributions and expenditures in contradiction of his statement filed with the state. As stated in the committee report—

> (Contestee) filed with the Clerk of the House of Representatives on December 1, 1942, a statement, as required by Federal law, showing receipts of $8,458.78 and total expenditures of $7,360.91. This statement . . . contradicted the statements filed by him with the secretary of state of the State of Wisconsin which showed "no receipts, disbursements, or obligations."

Contestant had filed a petition under state law challenging contestee's expenditure statement filed with the state, which petition had been denied.

With respect to contestee's statement filed with the Clerk of the House pursuant to federal law, the committee considered evidence which showed that it had been erroneously prepared by counsel and signed by contestee without knowledge of its contents. Contestee, upon discovery thereof, "had contacted the Clerk of the House of Representatives admitting the mistake and attempting to correct the same by filing an amended statement" showing that the expenditures had been made by two "voluntary committees" without his consent.

The report stated that—

> The committee in this report does not attempt to express any opinion on the laws of the State of Wisconsin which seem to limit the personal contributions and expenditures of the candidate himself, while placing no limit upon the contributions or expenditures which may be made through volunteer groups. Neither does it attempt to condone the action of the contestee, Mr. McMurray, in signing under oath the statement filed with the Clerk of the House of Representatives, without being familiar with the contents of the statement or the irregularities which it contained.

The report recommended that—

> Under these circumstances, the committee is of the opinion that Mr. McMurray, who received a substantial majority of votes in the general election of November 3, 1942, over Mr. Thill, his nearest opponent, should not be denied his seat in the House of Representatives on account of this error made in the statement filed by Mr. McMurray with the Clerk of the House of Representatives.

Mr. Peterson called up as privileged House Resolution 426[6] on

**6.** 90 CONG. REC. 933, 78th Cong. 2d Sess.; H. Jour. 65.

Jan. 31, 1944, immediately upon submission of the committee report. The resolution, which dismissed the contest, was agreed to by the House by voice vote after a short debate. House Resolution 426 provided as follows:

> *Resolved,* That the election contest of Lewis D. Thill, contestant, against Howard J. McMurray, contestee, Fifth Congressional District of the State of Wisconsin, be dismissed.

*Note:* Syllabi for Thill v McMurray may be found herein at § 10.4 (Corrupt Practices Act).

## § 53. Seventy-ninth Congress, 1945–46

### § 53.1 Hicks v Dondero

On Dec. 12, 1945, Mr. O. C. Fisher, of Texas, submitted the unanimous report[7] of the Committee on Elections No. 3 in the contest of John W. L. Hicks against George A. Dondero, from the 17th Congressional District of Michigan. The contest had originated in the House on July 20, 1945, on which date the Speaker had laid before the House a letter from the Clerk[8] relating that his office had received packets of material which had not been addressed to the Clerk or adduced in the "manner contemplated by the provisions of the statutes." The Clerk had also received contestee's motion to dismiss the contest and contestant's affidavit in opposition to that motion.

The Clerk's letter related that "since this action has not proceeded in accordance with the provisions of the statutes, the Clerk is transmitting all of the material received in this matter to the House for its disposition." The Speaker referred the Clerk's letter to the Committee on Elections No. 3 and ordered it printed as a House document.

The committee's final report stated that contestant had not taken any testimony in support of his notice of contest within the time prescribed by law. The report then stated:

> The contestant submitted two copies of transcripts of proceedings before the Wayne County, Mich., canvassing board on November 10, 11, and 30, 1944, which hearings were held on dates prior to the initiation of this contest. . . .
>
> The said transcripts of evidence were entirely ex parse insofar as contestee was concerned, and even if properly transmitted, would be incompetent as proof of any issues urged by contestant.

The report stated that contestee had been elected on Nov. 7, 1944,

7. H. Rept. No. 1404, 91 CONG. REC. 11931, 79th Cong. 1st Sess.; H. Jour. 766.

8. H. Doc. No. 264, 91 CONG. REC. 7877, 79th Cong. 1st Sess.; H. Jour. 542, 543.

by a majority of 28,475 votes over contestant, and had been properly certified as elected.

On Dec. 12, 1945, the day of submittal of the committee report, Mr. Fisher called up as privileged House Resolution 455 [9] which incorporated the language recommended in the report. House Resolution 455 was agreed to by voice vote and without debate, and it—

> *Resolved,* That the election contest of John W. L. Hicks, contestant, against George A. Dondero, contestee, Seventeenth Congressional District of the State of Michigan, be dismissed, and that the said George A. Dondero is entitled to his seat as a Representative of said district and State.

*Note:* Syllabi for Hicks v Dondero may be found herein at § 6.12 (items transmitted by Clerk); § 25.1 (failure to properly forward evidence); § 27.2 (dismissal for failure to take testimony within statutory period); § 34.3 (evidence from ex parse proceedings).

## § 53.2 In re Plunkett

On Feb. 14, 1945, Mr. Hatton W. Sumners, of Texas, was granted unanimous consent to address the House of Representatives for one minute. His speech, a letter inserted in the Record by him, and the ensuing debate, are as follows: [10]

> MR. SUMNERS of Texas: Mr. Speaker, comparatively recently a private citizen in Virginia has entered upon a course of conduct claiming he is contesting the seats of, I believe, 71 Members of the House of Representatives. A colleague of mine the other day asked me to make some examination and write him a letter. I made that examination and have written him the following letter:
>
> FEBRUARY 12, 1945.
>
> MY DEAR COLLEAGUE: Supplementing the statement made to you over the telephone this morning with reference to notice to appear and give testimony in proceeding by Moss A. Plunkett, of Roanoke, Va., representing himself as contesting your right to a seat in the House of Representatives, beg to advise that I have looked over a copy of the paper served upon you and other Members of the House of Representatives, including myself, and have also made some examination of chapter 7, title 2, of the United States Code, which deals with the subject of contested elections.
>
> The House of Representatives, under the Constitution, of course, is sovereign and independent with reference to the determination of the election and the qualification of its own Members. No act of Congress could, in the slightest degree, affect the exclusiveness of power of the House of Representatives to determine with reference to those who are entitled to be a part of its membership.
>
> Section 7 of title 2 referred to therefore is merely an act of comity

**9.** 91 CONG. REC. 11922, 11923, 79th Cong. 1st Sess.; H. Jour. 766.

**10.** 91 CONG. REC. 1083, 1084, 79th Cong. 1st Sess.

on the part of the Congress for the purpose of aiding the House of Representatives to whatever degree the House of Representatives may see fit to avail itself thereof. But this alleged contestant, Moss A. Plunkett, does not even come within the provision of this title.

Section 226, the last section of chapter 7, title 2, referred to, contains these words as the first part of the first sentence:

"No contestee or contestant for a seat in the House of Representatives shall be paid exceeding $2,000 for expenses in election contests."

The contest contemplated by the Congress in which it sought to give aid by statute is a contest by a "contestant" and "contestee," "for a seat in the House of Representatives."

Even if this language were not incorporated in the statute, common sense and public necessity would preclude any notion that the Congress intended to put it within the power of any person so disposed to institute proceedings to oust many persons who happen to be Members of Congress, and require them to turn aside from the discharge of their public duties to appear and give testimony at the summons of such a person who had not even been a candidate for Congress and who could not therefore be a "contestant for a seat in the Congress."

It seems to me to be not only the right, but the duty, of the Members of the House against whom this proceeding has been attempted, not to turn aside from the discharge of their official duties to give attention in the slightest degree to that which the said Plunkett is attempting.

Sincerely yours,
HATTON W. SUMNERS.

MR. [JOHN W.] MCCORMACK [of Massachusetts]: Mr. Speaker, will the gentleman yield?

MR. SUMNERS: I yield to the gentleman from Massachusetts.

MR. MCCORMACK: Will the gentleman advise the House how, in his opinion, this unreasonable situation should be met?

MR. SUMNERS: By paying no attention to it.

THE SPEAKER:[11] The time of the gentleman from Texas has expired.

MR. [JOHN E.] RANKIN [of Mississippi]: Mr. Speaker, I ask unanimous consent to address the House for 1 minute.

THE SPEAKER: Is there objection to the request of the gentleman from Mississippi?

There was no objection.

MR. RANKIN: Mr. Speaker, following up what the Member from Texas [Mr. Sumners], the very able chairman of the Committee on the Judiciary, has said, I want to call attention to the fact these radicals who are attempting to harass Members of Congress about this matter [poll taxes] have not a leg to stand on. They really are acting in contempt of the House, and in contempt of the Senate, because they have attempted to subpena Senators, as well as Members of the House.

This question has been thrashed out before. The fourteenth amendment to the Constitution provided that where certain people were denied the right to vote in any State, representation from such State should be proportionately reduced. . . .

If there is anything wrong with the State law, the place to contest it is in the courts. If there is anything wrong with a Member's right to sit in this House, the place to contest it is before a committee of the House. . . .

**11.** Sam Rayburn (Tex.).

So these attempts to harass the Members of the House and Senate are simply in contempt of both Houses, and as the chairman of the Judiciary Committee [Mr. Sumners] said, they should be ignored.

On May 17, 1945, the Speaker laid before the House a letter from the Clerk[12] of the House which stated that the Clerk "does not regard the said Moss A. Plunkett as a person competent to bring a contest for a seat in the House under the provisions of the laws governing contested elections." Mr. Plunkett was attempting to contest the election of 79 returned Members from districts of various states, growing out of the election held Nov. 7, 1944, though it appeared from the four sealed packages of testimony that Mr. Plunkett had not been party to any of the elections. The Clerk's letter was ordered printed by the Speaker as a House document, and referred to the Committee on Elections No. 1. There is no record that the committee submitted a report in this case, or that the House acted in any way upon the contest.

*Note:* Syllabi for In re Plunkett may be found herein at § 5.1 (committee jurisdiction over contest under contested election statutes); § 6.6 (items transmitted by Clerk); § 19.6 (contestants as candidates in general election).

## § 54. Eightieth Congress, 1947–48

### § 54.1 Lowe v Davis

On Apr. 27, 1948, Mr. Karl M. LeCompte, of Iowa, submitted the unanimous report[13] of the Committee on House Administration in the contested election case of Lowe v Davis, from the Fifth Congressional District of Georgia.

On July 25, 1947, the House had considered by unanimous consent and agreed to a resolution (H. Res. 337)[14] as follows:

*Resolved,* That notwithstanding any adjournment or recess of the Eightieth Congress, testimony and papers received by the Clerk of the House in any contested-election case shall be transmitted by the Clerk to the Speaker for reference to the Committee on House Administration in the same manner as though such adjournment or recess had not occurred: *Provided,* That any such testimony and papers referred by the Speaker shall be printed as House documents of the *next* succeeding session of the Congress. (Emphasis supplied.)

12. H. Doc. No. 181, 91 CONG. REC. 4726, 79th Cong. 1st Sess.; H. Jour. 347.

13. H. Rept. No. 1823, 94 CONG. REC. 4922, 80th Cong. 2d Sess.; H. Jour. 377.

14. 93 CONG. REC. 10210, 80th Cong. 1st Sess.; H. Jour. 698.

On July 25, 1947, Mr. Ralph A. Gamble, of New York, by unanimous consent offered another resolution by direction of the Committee on House Administration (H. Res. 338): [15]

> *Resolved*, That notwithstanding any adjournments or recesses of the first session of the Eightieth Congress, the Committee on House Administration is authorized to continue its investigation in the contested-election cases of Mankin against Davis, Lowe against Davis, and Wilson against Granger. For the purpose of making such investigations the committee, or any subcommittee thereof, is authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recesses, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, record, correspondence, memoranda, papers, and documents, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

House Resolution 338 was agreed to by voice vote and without debate.

Thereupon, Mr. LeCompte offered the following privileged resolution [16] from the Committee on House Administration (H. Res. 339) to implement House Resolution 338, which had previously been agreed to:

> *Resolved*, That the expenses of the investigations to be conducted pursuant to House Resolution 338, by the Committee on House Administration, acting as a whole or by subcommittee, not to exceed $5,000, including expenditures for the employment of investigators, attorneys, and clerical, stenographic, and other assistants, shall be paid out of the contingent fund of the House on vouchers authorized by such committee or subcommittee, signed by the chairman of such committee, or subcommittee, and approved by the Committee on House Administration.

House Resolution 339 was agreed to by voice vote and without debate.

On July 26, 1947, the House had adjourned to Jan. 6, 1948, but had been convened by proclamation of the President on Nov. 17, 1947, a continuation of the first session of the 80th Congress. The question of whether this reconvening of the Congress was to be considered a continuation of the existing session or a special or additional session arose in connection with the effective date of certain amendments to the rules of civil procedure in the courts, which amendments were to take effect three months subsequent to the adjournment of the first regular session of the Congress. The

**15.** *Id.*

**16.** *Id.*

Senate adopted as controlling a memorandum of the Federal Law Section, Library of Congress, to the effect that where Congress adjourns to a day certain—not *sine die*—and is convened earlier by proclamation of the President, such convening is a continuation of the existing session and not a special or additional session.

On Nov. 17, the Speaker took from the Speaker's table and referred to the Committee on House Administration a letter from the Clerk[17] transmitting the required papers (absent contestee's brief). The Speaker did not lay the communication before the House, but did order it printed as a House document (H. Doc. No. 434) of the first session of the 80th Congress. (Neither the *Congressional Record*, p. 10613, nor the Journal, p. 771, indicate, however, that the communication had been ordered printed by the Speaker.)

The committee report indicated that the committee had held full hearings on Mar. 17, 1948, and had given consideration to contestee's brief, which had not been filed within 30 days after reception of a copy of contestant's brief, as required by 2 USC § 223. The summary report recommended that the contest be dismissed "as lacking in merit."

The debate on House Resolution 552,[18] which dismissed the accompanying contest of Mankin v Davis on Apr. 27, 1948, indicated that contestant was disputing the method by which contestee had been nominated in the primary election. Contestee had been selected as his party's nominee under Georgia state law, which prescribed use of the "county unit system." Contestant in this case had not been a candidate in the general election. Presumably, as in the later case of Lowe v Davis (§ 56.3, infra) in the 82d Congress, contestant had been a candidate for the Democratic nomination in the primary election.

On Apr. 27, 1948, Mr. LeCompte called up House Resolution 553[19] as privileged, which provided as follows:

> *Resolved*, That the election contest of Wyman C. Lowe, contestant, against James C. Davis, contestee, Fifth Congressional District of Georgia, be dismissed and that the said James C. Davis is entitled to his seat as a Representative of said District and State.

Whereupon the resolution was agreed to without debate and without a record vote, thereby dis-

**17.** H. Doc. No. 434, 93 CONG. REC. 10613, 80th Cong. 1st Sess.; H. Jour. 771.

**18.** 94 CONG. REC. 4902, 80th Cong. 2d Sess.; H. Jour. 374.

**19.** *Id.*

missing the contest and holding contestee entitled to his seat.

## § 54.2 Mankin v Davis

On July 25, 1947, the House, in the first session of the 80th Congress, considered by unanimous consent and agreed to the following resolution (H. Res. 337),[20] offered by Mr. Ralph A. Gamble, of New York:

> *Resolved,* That notwithstanding any adjournment or recess of the Eightieth Congress, testimony and papers received by the Clerk of the House in any contested-election case shall be transmitted by the Clerk to the Speaker for reference to the Committee on House Administration in the same manner as though such adjournment or recess had not occurred: *Provided,* That any such testimony and papers referred by the Speaker shall be printed as House documents of the *next* succeeding session of the Congress. [Emphasis supplied.]

On July 25, 1947, Mr. Gamble, by unanimous consent offered another resolution by direction of the Committee on House Administration (H. Res. 338):[1]

> *Resolved,* That notwithstanding any adjournments or recesses of the first session of the Eightieth Congress, the Committee on House Administration is authorized to continue its investigation in the contested-election cases of Mankin against Davis, Lowe against Davis, and Wilson against Granger. For the purpose of making such investigations the committee, or any subcommittee thereof, is authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recesses, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

House Resolution 338 was agreed to by voice vote and without debate.

Thereupon, Mr. LeCompte offered the following privileged resolution from the Committee on House Administration (H. Res. 339)[2] to implement House Resolution 338 which had previously been agreed to:

> *Resolved,* That the expenses of the investigations to be conducted pursuant to House Resolution 338, by the Committee on House Administration, acting as a whole or by subcommittee, not to exceed $5,000, including expenditures for the employment of investigators, attorneys, and clerical, stenographic, and other assistants, shall be

**20.** 93 CONG. REC. 10210, 80th Cong. 1st Sess.; H. Jour. 698.

**1.** *Id.*

**2.** *Id.*

paid out of the contingent fund of the House on vouchers authorized by such committee or subcommittee, signed by the chairman of such committee, or subcommittee, and approved by the Committee on House Administration.

On July 26, 1947, the House had adjourned to Jan. 6, 1948, but had been convened by proclamation of the President on Nov. 17, 1947, which session was considered a continuation of the first session of the 80th Congress.

The question of whether this reconvening of the Congress resulting from the Presidential proclamation was to be considered a continuation of the existing session or a special or additional session arose in connection with the effective date of certain amendments to the rules of civil procedure in the courts, which amendments were to take effect three months subsequent to the adjournment of the first regular session of the Congress. The Senate adopted as controlling a memorandum of the Federal Law Section, Library of Congress, to the effect that where Congress adjourns to a day certain—not *sine die*—and is convened earlier by proclamation of the President, such convening is a continuation of the existing session and not a special or additional session.

On Nov. 17, the Speaker took from the Speaker's table and referred to the Committee on House Administration a letter from the Clerk[3] transmitting the required papers (absent contestee's brief). The Speaker did not lay the communication before the House, but did order it printed as a House document (H. Doc. No. 433) of the first session of the 80th Congress. (Neither the *Congressional Record*, p. 10613, nor the Journal, p. 771, indicate, however, that the communication had been ordered printed by the Speaker.)

The committee report indicated that the committee had held full hearings in the contest, and had given consideration to contestee's brief, which had not been filed within 30 days after reception of a copy of contestant's brief, as required by 2 USC § 223. The summary report recommended that the contest be dismissed "as lacking in merit."

House Resolution 552[4] was called up as privileged by Mr. Karl M. LeCompte, of Iowa, on Apr. 27, 1948, accompanied by the unanimous reports[5] of the Committee on House Administration

**3.** H. Doc. No. 443, 93 CONG. REC. 10613, 80th Cong. 1st Sess.; H. Jour. 771.

**4.** 94 CONG. REC. 4902, 80th Cong. 2d Sess.; H. Jour. 374.

**5.** H. Rept. No. 1823, 94 CONG. REC. 4922, 80th Cong. 2d Sess.; H. Jour. 377.

submitted by Mr. LeCompte on that date. The debate which ensued indicated that contestant was disputing the method by which contestee had been nominated in the primary election. Contestant had not herself been a candidate in the general election. Contestee had been selected as his party's nominee under Georgia State law which required use of the "county unit system"[6] (presumably whereby each county of the district was accorded one vote, determined by the majority of votes cast therein, and the nominee is thereafter determined by the majority of the county votes cast). Mr. LeCompte contended that unless the House desired to invalidate the state election laws as they pertained to this election, the House should adopt House Resolution 552. Accordingly the House agreed to House Resolution 552 without further debate and without a record vote and thereby dismissed the contest and declared contestee entitled to his seat:

> *Resolved*, That the election contest of Helen Douglas Mankin, contestant, against James C. Davis, contestee, Fifth Congressional District of Georgia, be dismissed and that the said James C. Davis is entitled to his seat as a Representative of said District and State.

*Note:* Syllabi for Mankin v Davis may be found herein at § 6.11 (items transmitted by Clerk); § 24.1 (contestee's failure to make timely answer); § 43.2 (form of report).

### § 54.3 Michael v Smith

On Apr. 22, 1947, the Speaker laid before the House a letter from the Clerk[7] of the House transmitting copies of the notice of contestant and the reply thereto in the contest of Michael v Smith from the Eighth Congressional District of Virginia. The Clerk's letter stated that no testimony had been taken by either party within the time permitted by law. The contestant had filed with his notice of contest a copy of the court record of a suit which had been initiated by contestant in the United States District Court for the Eastern District of Virginia to determine certain legal issues raised by the election of Nov. 5, 1946. On Apr. 22, 1947, the Speaker referred to the Committee on House Administration the Clerk's letter, and ordered it printed, together with the accompanying papers mentioned above, as a House document.

Contestant alleged in his brief that the election had not been

**6.** 94 CONG. REC. 4902, 80th Cong. 2d Sess.

**7.** H. Doc. No. 213, 93 CONG. REC. 3800, 3827, 80th Cong. 1st Sess.; H. Jour. 281, 282.

conducted in conformity with the 14th and 15th amendments to the United States Constitution, in that state law imposed a poll tax and required certain registration forms in violation thereof, which requirements, furthermore, were not applied uniformly to all citizens. Contestee in his answer alleged that contestant had no standing to contest the election, as he conceded having been defeated by 7,513 votes and that his only contention presented strictly a legal question to be decided in court, which question had been decided contrary to contestant's position. No testimony was transmitted to the House.

On July 26, 1947, the Clerk transmitted contestee's motion to dismiss[8] the contest to the Speaker, who laid the Clerk's communication before the House, referred it to the Committee on House Administration, and ordered it printed with the accompanying motion to dismiss. On that same day Mr. Ralph A. Gamble, of New York, submitted the unanimous report[9] from the Committee on House Administration, which summary report also provided for disposition of the election contests of Roberts v Douglas (14th Congressional District of California) and Woodward v O'Brien (Sixth Congressional District of Illinois). The report recited that no testimony in behalf of contestants had been taken during the time prescribed by law in any of the contests, and recommended that notices of intention to contest the elections of contestees be dismissed.

Mr. Gamble called up House Resolution 345[10] on July 26, 1947, which was agreed to by the House without debate and by voice vote, and which—

> *Resolved*, That the election contest of Harold C. Woodward, contestant, against Thomas J. O'Brien, contestee, Sixth Congressional District of Illinois, be dismissed, and that the said Thomas J. O'Brien is entitled to his seat as a Representative of said district and State; and be it further
>
> *Resolved*, That the election contest of Frederick M. Roberts, contestant, against Helen Gahagan Douglas, contestee, Fourteenth Congressional District of California, be dismissed and that the said Helen Gahagan Douglas is entitled to her seat as a Representative of said district and State; and be it further
>
> *Resolved*, That the election contest of Lawrence Michael, contestant, against

**8.** H. Doc. No. 418, 93 CONG. REC. 10522, 80th Cong. 1st Sess.; H. Jour. 714.

**9.** H. Rept. No. 1106, 93 CONG. REC. 10523, 80th Cong. 1st Sess.; H. Jour. 716, 746.

**10.** 93 CONG. REC. 10445, 80th Cong. 1st Sess.; H. Jour. 716.

Howard W. Smith, contestee, Eighth Congressional District of the State of Virginia, be dismissed, and that the said Howard W. Smith is entitled to his seat as a Representative of said district and State.

## § 54.4 Roberts v Douglas

On July 25, 1947, the Speaker laid before the House a letter from the Clerk[11] which related that neither party had taken testimony during the time prescribed by law and that the contest of Roberts v Douglas, from the 14th Congressional District of California, appeared abated. The Clerk's letter, together with copies of contestant's notice of contest and contestee's motion to dismiss with a copy of her attorney's letter in support thereof, were referred to the Committee on House Administration by the Speaker and ordered printed with those accompanying papers as a House document.

Contestant's notice recited only that—

> Contest of your right to hold said seat is entered upon the grounds of failure to meet residence requirements under both the Constitution of the United States and of the State of California.
>
> Additional grounds for contest of your right to hold said congressional seat is to be found in many fraudulent practices alleged in the election of November 5, 1946, which justify congressional investigation.

Contestee in her motion to dismiss claimed (1) that contestant had not instituted a valid contest, as the statute (2 USC § 201) and House precedents required contestant to "specify particularly the grounds upon which he relies in the contest," i.e., the notice stated no facts which contestee could either admit or deny in an answer; and (2) contestant had taken no testimony within the 90 days permitted to support his notice of contest.

On the following day, July 26, 1947, Mr. Ralph A. Gamble, of New York, submitted the unanimous report[12] from the Committee on House Administration, which summary report also provided for disposition of the election contests of Woodward v O'Brien (Sixth Congressional District of Illinois) and Michael v Smith (Eighth Congressional District of Virginia). [H. Rept. No. 11061.] The report stated that no testimony in behalf of contestants had been taken during the time prescribed by law in any of the contests, and recommended that notices of intention to contest the

**11.** H. Doc. No. 416, 93 CONG. REC. 10211, 80th Cong. 1st Sess.; H. Jour. 710, 711.

**12.** 93 CONG. REC. 10523, 80th Cong. 1st Sess.; H. Jour. 716, 746.

elections of contestees be dismissed.

Mr. Gamble called up House Resolution 345[13] on July 26, 1947, which was agreed to by the House without debate and by voice vote, and which——

> *Resolved*, That the election contest of Harold C. Woodward, contestant, against Thomas J. O'Brien, contestee, Sixth Congressional District of Illinois, be dismissed, and that the said Thomas J. O'Brien is entitled to his seat as a Representative of said district and State; and be it further
>
> *Resolved*, That the election contest of Frederick M. Roberts, contestant, against Helen Gahagan Douglas, contestee, Fourteenth Congressional District of California, be dismissed and that the said Helen Gahagan Douglas is entitled to her seat as a Representative of said district and State; and be it further
>
> *Resolved*, That the election contest of Lawrence Michael, contestant, against Howard W. Smith, contestee, Eighth Congressional District of the State of Virginia, be dismissed, and that the said Howard W. Smith is entitled to his seat as a Representative of said district and State.

*Note:* Syllabi for Roberts v Douglas may be found herein at § 6.7 (items transmitted by Clerk); § 13.8 (failure to specify grounds relied upon by contestant); § 22.3 (failure to state grounds with particularity); § 27.4 (dismissal for failure to take testimony within statutory period); § 44.3 (form of resolution disposing of contest).

### § 54.5 Wilson v Granger

On June 17, 1948 (Calendar Day June 18), Mr. Karl M. LeCompte, of Iowa, submitted the report[14] to accompany House Resolution 692 from the (Committee on House Administration in the contested election case of Wilson v Granger from the First Congressional District of Utah. The contest had been presented to the House on Feb. 12, 1948, when the Clerk had transmitted to the Speaker a letter[15] accompanied by the required testimony and papers, which letter the Speaker pro tempore[16] had on that date ]aid before the House and referred to the committee. The Clerk's letter, which was not ordered printed as a House document, provided:

> Sir: The Clerk has received from Frank W. Otterstrom, the officer before whom testimony was taken in the contested-election case of David J. Wilson against Walter K. Granger, for a seat in the Eightieth Congress from the First Congressional District of the State of Utah, letters dated January

**13.** 93 CONG. REC. 10445, 80th Cong. 1st Sess.; H. Jour. 716.

**14.** H. Rept. No. 2418, 94 CONG. REC. 8964, 80th Cong. 2d Sess.; H. Jour. 709, 713.

**15.** 94 CONG. REC. 1276, 80th Cong. 2d Sess.; H. Jour. 118.

**16.** Earl C. Michener (Mich.).

10, February 3, and February 6, 1948, with reference to the transmission of testimony and exhibits in the aforesaid case.

The letters from this officer, together with the two express packages, the airmail package, and exhibit No. 109 referred to therein, as well as copies of all other papers heretofore filed with the Clerk relating to this case, are transmitted to the House for its action.

On July 25, 1947, Mr. Ralph A. Gamble, of New York, offered two privileged resolutions by direction of the Committee on House Administration.[17] The first, House Resolution 337 which was agreed to by voice vote and without debate, provided:

*Resolved,* That notwithstanding any adjournment or recess of the Eightieth Congress, testimony and papers received by the Clerk of the House in any contested-election case shall be transmitted by the Clerk to the Speaker for reference to the Committee on House Administration in the same manner as though such adjournment or recess had not occurred: *Provided,* That, any such testimony and papers referred by the Speaker shall be printed as House documents of the next succeeding session of the Congress.

Mr. Gamble then offered House Resolution 338 which was also agreed to by voice vote and without debate, and which provided:

*Resolved,* That notwithstanding any adjournments or recesses of the first session of the Eightieth Congress, the Committee on House Administration is authorized to continue its investigation in the contested-election cases of Mankin against Davis, Lowe against Davis, and Wilson against Granger. For the purpose of making such investigations the committee, or any subcommittee thereof, is authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

Thereupon, Mr. LeCompte reported[18] and called up the following privileged resolution[19] from the Committee on House Administration (H. Res. 339) to implement House Resolution 338, which had previously been agreed to:

*Resolved,* That the expenses of the investigations to be conducted pursuant to House Resolution 338, by the

**17.** 93 CONG. REC. 10210, 80th Cong. 1st Sess.; H. Jour. 698.

**18.** H. Rept. No. 1089, 93 CONG. REC. 10283, 80th Cong. 1st Sess.; H. Jour. 698.

**19.** 93 CONG. REC. 10210, 80th Cong. 1st Sess.; H. Jour. 698.

> Committee on House Administration, acting as a whole or by subcommittee, not to exceed $5,000, including expenditures for the employment of investigators, attorneys, and clerical, stenographic, and other assistants, shall be paid out of the contingent fund of the House on vouchers authorized by such committee or subcommittee, signed by the chairman of such committee, or subcommittee, and approved by the Committee on House Administration.

House Resolution 339 was agreed to by voice vote and without debate.

The committee report acknowledged "numerous and widespread errors and irregularities in many parts of the district, which revealed a lack of knowledge of the law and a failure to enforce properly the registration and election statutes by those charged with that duty." The committee found that the correct result of the election was not affected by the irregularities shown. The minority report, signed by four members of the committee, claimed that contestant should be seated, due to various voting-law violations, which would nullify the total votes of various precincts and thereby overturn the 104-vote majority received by contestee. Specifically, the minority claimed that state laws prohibiting transportation of voters to places of registration and confining registration to certain hours and by certain officials were violated "in all of the populous counties in the district."

The delay of over a year by the parties in filing the required papers with the Clerk as provided by statute is explained merely by the statement in the report that "the extensions of time heretofore granted in this contest by the Committee on House Administration are hereby authorized and approved."

House Resolution 692[20] was called up as privileged by Mr. LeCompte and agreed to after a short statement by him, without further debate, on June 19, 1948. The resolution, adopted by voice vote, provided as follows:

> *Resolved*, That the election contest of David J. Wilson, contestant, against Walter K. Granger, contestee, First Congressional District of Utah, be dismissed, and that the said Walter K. Granger is entitled to his seat as a Representative of said district and State.

*Note:* Syllabi for Wilson v Granger may be found herein at § 5.12 (continuing investigations by elections committee); § 10.12 (distinction between mandatory and directory laws); § 27.14 (subsequent authorization for informal extension of time); § 35.3 (burden

**20.** 94 CONG. REC. 9184, 80th Cong. 2d Sess.; H. Jour. 770.

of showing results of election would be changed); § 45.1 (payments from contingent fund).

## § 54.6 Woodward v O'Brien

On Feb. 27, 1947, the Speaker laid before the House a letter from the Clerk[1] of the House transmitting (1) a copy of the notice of contest growing out of the election held Nov. 5, 1946, in the Sixth Congressional District of Illinois, and (2) a letter from the contestant, Harold C. Woodward, stating that contestee had not answered the notice of contest filed with him within the time prescribed by 2 USC § 202, and requesting that all allegations contained in the notice be considered as admitted by contestee and that a default be entered against contestee by the House. As stated in the Clerk's letter—

> Since the letter of the contestant (item 2) requests the Clerk to refer this matter to the House of Representatives for appropriate action, and further, since the question raised by the contestant in this communication will have to be decided by the House itself, the Clerk is transmitting these communications herewith for consideration by the appropriate committee.

The Clerk's letter was referred by the Speaker to the Committee on House Administration on Feb. 28, 1947, and ordered printed as a House document to contain the papers itemized above.

Contestant's notice recited that the 13,076-vote majority which had been certified for contestee had been determined by election judges and clerks who improperly counted and reported the votes, or improperly certified the election results. Contestant's notice set forth 17 particular forms of error which he alleged would, if corrected, establish 20,000 votes for him.

On July 11, 1947, the Speaker laid before the House a letter[2] from the Clerk transmitting a motion by contestee to dismiss the contest, which motion recited that contestee had, on Mar. 5, filed an answer to contestant's notice (though not within the time required by statute), that more than 90 days had elapsed since such answer, during which time no testimony had been taken by contestant. The Speaker referred the Clerk's letter to the committee and ordered it printed to include the motion to dismiss.

On July 26, 1947, Mr. Ralph A. Gamble, of New York, submitted the unanimous report[3] from the

1. H. Doc. No. 156, 93 CONG. REC. 1517, 80th Cong. 1st Sess.; H. Jour. 159.

2. H. Doc. No. 400, 93 CONG. REC. 8756, 80th Cong. 1st Sess.; H. Jour. 575.

3. 93 CONG. REC. 10523, 80th Cong. 1st Sess.; H. Jour. 716, 746.

Committee on House Administration in the contests of Woodward v O'Brien, which summary report also provided for disposition of the election contests of Roberts v Douglas (14th Congressional District of California), and Michael v Smith (Eighth Congressional District of Virginia). [H. Rept. No. 1106.] The report recited that no testimony in behalf of contestants had been taken during the time prescribed by law in any of the contests, and recommended that notices of intention to contest the elections of contestees be dismissed.

Mr. Gamble called up House Resolution 345[4] on July 26, 1947, which was agreed to by the House without debate and by voice vote, and which—

> *Resolved,* That the election contest of Harold C. Woodward, contestant, against Thomas J. O'Brien, contestee, Sixth Congressional District of Illinois, be dismissed, and that the said Thomas J. O'Brien is entitled to his seat as a Representative of said district and State; and be it further
>
> *Resolved,* That the election contest of Frederick M. Roberts, contestant, against Helen Gahagan Douglas, contestee, Fourteenth Congressional District of California, be dismissed and that the said Helen Gahagan Douglas is entitled to her seat as a Representative of said district and State; and be it further
>
> *Resolved,* That the election contest of Lawrence Michael, contestant, against Howard W. Smith, contestee, Eighth Congressional District of the State of Virginia, be dismissed, and that the said Howard W. Smith is entitled to his seat as a Representative of said district and State.

*Note:* Syllabi for Woodward v O'Brien may be found herein at § 5.6 (committee power to dismiss election contests); § 23.2 (motion for default judgment); § 27.5 (dismissal of contests for failure to take testimony within statutory period); § 43.1 (form of committee report).

## § 55. Eighty-first Congress, 1949–50

### § 55.1 Browner v Cunningham

Mr. Thomas B. Stanley, of Virginia, submitted the unanimous report[5] of the Committee on House Administration on Aug. 11, 1949, in the contested election case of Browner v Cunningham from the Fifth Congressional District of Iowa. (The report also contained committee recommendations in the contested election cases of Fuller v Davies, 35th Congressional District of New York, and of Thierry v Feighan,

**4.** 93 CONG. REC. 10445, 80th Cong. 1st Sess.; H. Jour. 716.

**5.** H. Rept. No. 1252, 95 CONG. REC. 11316, 81st Cong. 1st Sess.; H. Jour. 831.

20th Congressional District of Ohio.) The case had come to the House (along with the other two cases above mentioned) on July 26, 1949, when the Speaker had laid before the House a letter from the Clerk[6] transmitting a copy of contestee's answer (filed for information only) and relating that no testimony had been received, the time for such having long since expired. The letter, containing as well the Clerk's opinion that the contest had abated, was referred by the Speaker on July 26 to the committee, and ordered printed with accompanying papers as a House document.

Contestee's answer filed with the Clerk alleged among other things that contestant had not filed notice of intention to contest the election within 30 days after determination of the result thereof as required by statute, and that the 30-day state law requirement for impounding election machines had expired, thus rendering the machines themselves incompetent as evidence.

The summary and unanimous report from the Committee on House Administration stated that:

> Under the laws and committee rules governing contested-election cases in the House of Representatives, more than 90 days elapsed since the filing of notice to contest the elections of the respective contestees in the above-entitled contested-election cases, and no testimony of any character, kind, or nature of the parties in the said contests having been received by the Clerk of the House of Representatives in behalf of the contestants in support of the allegations set forth in their notice of intention to contest said election.
>
> It is hereby respectfully submitted that notice of intention to contest the election in the afore-mentioned cases be dismissed by reason of failure to comply with the laws and committee rules governing contested-election cases in the House of Representatives.

Accordingly, House Resolution 324[7] was called up as privileged by Mr. Stanley and agreed to without debate and by voice vote on Aug. 11, 1949. House Resolution 324 provided:

> *Resolved*, That the election contest of Vincent L. Browner, contestant, against Paul Cunningham, contestee, Fifth Congressional District of the State of Iowa, be dismissed, and that the said Paul Cunningham is entitled to his seat as a Representative of said district and State; be it further
>
> *Resolved*, That the election contest of Hadwen C. Fuller, contestant, against John C. Davies, contestee, Thirty-fifth Congressional District of the State of New York, be dismissed and that the said John C. Davies is entitled to his seat as a Representative of said district and State; and be it further

**6.** H. Doc. No. 277, 95 CONG. REC. 10248, 10249, 81st Cong. 1st Sess.; H. Jour. 751.

**7.** 95 CONG. REC. 11294, 81st Cong. 1st Sess.; H. Jour. 830.

*Resolved*, That the election contest of James F. Thierry, contestant, against Michael A. Feighan, contestee, Twentieth Congressional District of the State of Ohio, be dismissed and that the said Michael A. Feighan is entitled to his seat as a Representative of said district and State.

*Note:* Syllabi for Browner v Cunningham may be found herein at § 6.8 (items transmitted by Clerk); § 24.2 (answer filed for information only); § 27.1 (dismissal for failure to take testimony within statutory period).

### § 55.2 Fuller v Davies

On Aug. 11, 1949, Mr. Thomas B. Stanley, of Virginia, submitted the unanimous report[8] of the Committee on House Administration in the contested election case of Fuller v Davies from the 35th Congressional District of New York. The report also contained committee recommendations in the contested election cases of Thierry v Feighan, 20th Congressional District of Ohio, and Browner v Cunningham, Fifth Congressional District of Iowa. The case had been presented to the House (with the two other cases above mentioned) on July 26, 1949, at which time the Speaker had laid before the House a letter from the Clerk[9] transmitting copies of contestant's notice and of contestee's answer thereto, and containing the Clerk's statement that the contest had abated, as no testimony had been received within the time required by law. The Clerk's letter was referred to the Committee on House Administration and ordered printed with accompanying papers.

Contestant's notice contained 11 forms of fraud, irregularity, and discrepancy alleged to have occurred in certain wards within the district, sufficient to annul the 138-vote majority received by contestee. Contestee's answer denied these allegations severally.

The summary and unanimous report from the Committee on House Administration stated that:

> Under the laws and committee rules governing contested-election cases in the House of Representatives, more than 90 days elapsed since the filing of notice to contest the elections of the respective contestees in the above-entitled contested-election cases, and no testimony of any character, kind, or nature of the parties in the said contests having been received by the Clerk of the House of Representatives in behalf of the contestants in support of the allegations set forth in their notice of intention to contest said election.

**8.** H. Rept. No. 1252, 95 CONG. REC. 11316, 81st Cong. 1st Sess.; H. Jour. 831.

**9.** H. Doc. No. 278, 95 CONG. REC. 10249, 81st Cong. 1st Sess.; H. Jour. 751.

It is hereby respectfully submitted that notice of intention to contest the election in the afore-mentioned cases be dismissed by reason of failure to comply with the laws and committee rules governing contested-election cases in the House of Representatives.

Accordingly, House Resolution 324 [10] was called up as privileged by Mr. Stanley and agreed to without debate and by voice vote on Aug. 11, 1949. House Resolution 324 declared:

*Resolved*, That the election contest of Vincent L. Browner, contestant, against Paul Cunningham, contestee, Fifth Congressional District of the State of Iowa, be dismissed, and that the said Paul Cunningham is entitled to his seat as a Representative of said district and State; be it further

*Resolved*, That the election contest of Hadwen C. Fuller, contestant, against John C. Davies, contestee, Thirty-fifth Congressional District of the State of New York, be dismissed and that the said John C. Davies is entitled to his seat as a Representative of said district and State; and be it further

*Resolved*, That the election contest of James F. Thierry, contestant, against Michael A. Feighan, contestee, Twentieth Congressional District of the State of Ohio, be dismissed and that the said Michael A. Feighan is entitled to his seat as a Representative of said district and State.

## § 55.3 Stevens v Blackney

The contested election case of Stevens v Blackney, from the Sixth Congressional District of Michigan, was presented to the House on Sept. 22, 1949, at which time the Speaker laid before the House and referred to the Committee on House Administration a letter from the Clerk.[11] The Clerk's letter, which was ordered printed by the Speaker as a House document, recited that, agreed upon or proper testimony had been ordered printed by the Clerk, and, together with notice of contest and answer, and briefs, had been sealed and was ready for referral to the Committee on House Administration.

On Mar. 6, 1950, Mr. Burr P. Harrison, of Virginia, submitted the committee report [12] to accompany the recommended committee resolution declaring contestee entitled to his seat. Part II of the report contained the views of Mr. Wayne L. Hays, of Ohio, and of Mr. Anthony Cavalcante, of Pennsylvania.

The majority report set forth three issues in the contest as follows:

(1) Whether contestant without evidence is entitled to a recount

**10.** 95 CONG. REC. 11294, 81st Cong. 1st Sess.; H. Jour. 830.

**11.** H. Doc. No. 336, 95 CONG. REC. 13177, 81st Cong. 1st Sess.; H. Jour. 917.

**12.** H. Rept. No. 1735, 96 CONG. REC. 2898, 81st Cong. 2d Sess.; H. Jour. 186.

under the supervision of the House committee?

The report indicated that the contestant had, on Feb. 10, 1949, applied to the Committee on House Administration to send its agents to conduct a recount, prior to contestant's taking of any testimony during the time prescribed by statute. On Feb. 15, 1949, the Subcommittee on Elections informed contestant that the House could, "on recommendation from the committee, order a recount after all testimony had been taken, in precincts where the official returns were impugned by such evidence" (citing House precedents). The committee rationale in support of this unanimous subcommittee recommendation was that the probability of error should first be shown, that a Member whose election has been certified should not be subjected to "fishing expeditions," that the committee would be overburdened with "frivolous contests," that an unwise precedent would be set, and that there is no proof that a House-conducted recount would be more accurate. The minority report did not contest this conclusion, but did point out in connection with another communication that on the date of the communication (Mar. 2, 1949) "there was nothing before the subcommittee or the House except contestant's notice and contestee's answer thereto." These papers and all testimony were in the custody of the Clerk until Sept. 22, 1949, on which date the contest was presented to the House.

(2) Whether contestant, of his own accord and without evidence, is entitled to conduct a recount without any supervision?

The facts as presented in the "chronological chart of events" contained in the minority report, indicate that contestant did on two separate occasions cause a subpena duces tecum to be issued directing the election officials to deliver up the original ballots and voting machines to a notary public of contestant's own selection. On Feb. 3, 1949, the contestant had caused such subpena duces tecum to be issued, and on Feb. 10, contestee had obtained a restraining order against such subpena from a local chancery court. On Feb. 14, a local election official appeared before the notary public but refused to bring with him the ballots, etc., on the basis of the restraining order, which the chancery court had issued based on contestee's argument that such a recount had not been ordered by the House or by its committee. On Feb. 25, on removal to the United States district court, the contest-

ant succeeded in obtaining an order dissolving the chancery court restraining order.

On Mar. 2, 1949, contestant again caused to be served a subpena duces tecum on the local election official, who, on Mar. 8, again refused to produce the requested ballots, tally sheets, and statements. The election official based this second refusal on a communication, dated Mar. 2, which he had received from the Subcommittee on Elections of the Committee on House Administration. Signed by Burr P. Harrison, of Virginia, its Chairman, the communication read as follows:

> The Subcommittee on Elections has ruled that a recount of the ballots at this time is premature and irrelevant. There is no process under Federal law whereby a notary public can be directed to take possession of ballots in an election contest.
>
> I do not know whether under the law of your State a notary public has the power to issue a subpoena duces tecum and as to this, and as to whether the subpoena has been issued in accordance with the law of the State, you are referred to your own attorney.
>
> Precedents of the House of Representatives clearly establish that in a contested election case ballots should be inspected and preserved in strict conformity with State law so that their inviolability is unquestioned. No action should be taken by either contestant or contestee with reference to ballots that does not follow the law of the State.
>
> The official count of the ballots is presumed correct, and I am certain that this presumption will not be brought into question by any unauthorized recount which is made contrary to State law or under circumstances which do not give full protection to both contestant and contestee.

On Mar. 15, 1949, the Subcommittee on Elections "sustained the action of the election official who had refused to comply with such subpena duces tecum." To this decision and to the communication above, the minority report took strong exception. The minority contended that the notary public was an "officer" of the House by virtue of 2 USC § 206 and the Supreme Court case of *In re Loney* (1890), 134 U.S. 372, which stated that "any one of the officers designated by Congress to take the depositions of such witnesses (whether he is appointed by the United States . . . Or by a State, such as a . . . notary public) performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress. . . ."

The minority again pointed out that at the time of the communication from the chairman of the subcommittee, the election contest had not been presented to the House. The minority cited several

House election cases wherein it had been held that a notary public was a proper official of the House before whom testimony could be taken, and before whom ballots may be examined and a report submitted to the House. Taking further exception to Mr. Harrison's communication, the minority contended that a notary public acting in such capacity derived his authority from the federal election laws and the rules of the House, and that a notary public so appointed need not inspect the ballots in strict conformity with state law, as the power to examine ballots vested in the House is infinite.

The majority report, however, resolved issue (2) by deciding that the power of an officer (notary public) to require the production of "papers" (under 2 USC § 219) pertaining to the election did not require the production of "ballots." This decision of the majority of the committee was contrary to previous precedents of the House, i.e., Greevy v Scull (2 Hinds' Precedents § 1044) and Kunz v Granata (6 Cannon's Precedents § 186) which held that ballots are among the "papers" of which the officer taking testimony in an election case may demand the production. The minority also cited Rinaker v Downing (2 Hinds' Precedents § 1070), in which the majority report coincided with the above precedents, but where "the majority report referred to was rejected by the House and the resolution of the minority substituted." The majority report in Stevens v Blackney stated that the accepted procedure was that the House itself should order a recount, and provide the subpena power and payment of the expenses thereof.

The majority rationale for their construction of the word "papers" was based upon certain practical considerations, such as the difficulty of submitting certified copies of such "official papers" to the Clerk, payment to officials for making such copies, inclusion of voting machines as official papers. Further, the majority cited the problem of deciding which count would be accepted by the House, that of contestant's notary public or that of the bipartisan officials who first conducted the count, should contestant be permitted to conduct a recount on his own motion. The alternative that the House could then conduct a third count, related the majority, would not overcome the dilemma, as the inviolability of the ballots would then have been destroyed. The option of authorizing the contestee to name a second notary to attend

the hearings would not resolve the question of which notary would have custody of the ballots overnight.

Citing early cases, the majority report quoted the "accepted uniform rule" in holding that a magistrate taking testimony "was not a person or a tribunal authorized to try the merits of the election and had no authority under the law of Pennsylvania or of Congress to order those boxes to be broken open. . . . The committee were of the opinion that such an application should be founded upon some proof sufficient at least to raise a presumption of mistake, irregularity, or fraud in the original count, and ought not to be granted upon the mere suggestion of possible error. The contestant failed to furnish such proof."

(3) Did the evidence in this case justify a recount of the ballots?

Of the 207 precincts in the congressional district, the evidence showed, according to the majority report, that election officials in four of those precincts had erroneously counted ballots, which had been marked as straight party ballots and also marked for the congressional candidate of another party, as votes for both candidates. Those errors were corrected by the official canvassers and were not reflected in the official returns. The report related that from the statement of one of the election officials that the same erroneous method of counting could have been followed in other precincts, contestant was urging that a total recount be conducted. Contestant accompanied this contention with evidence attacking the returns of three precincts. Contestant submitted no evidence, however, that the law of Michigan had been violated either in the appointment of bipartisan election officials or in allowing challengers of contestant's party to be present in any of the remaining 200 precincts. Thus, the majority of the committee applied a principle of evidence to presume that the failure of contestant to produce party election officials and challengers from any of the 200 precincts as witnesses must have been "because their testimony would show an honest and fair count."

On this issue, the minority report contended that, as the recount in seven precincts had reduced contestee's plurality from 1,217 votes to 784 votes, that it was reasonable to assume that a complete recount would overcome contestee's plurality. Citing Galvin v O'Connell (6 Cannon's Precedents § 126) the minority contended that "if it is reasonable to suppose there was error in

judgment in counting ballots cast in a portion of the precincts in the district, it is equally reasonable to assume there was error in judgment in counting the ballots in the remaining precincts."

On May 23, 1950, Mr. Harrison called up as privileged House Resolution 503,[13] and immediately yielded to Mr. Cavalcante, who offered a substitute[14] resolution which:

> *Resolved,* That the contested-election case of George D. Stevens v. William W. Blackney from the Sixth Michigan Congressional District (Eighty-first Congress, election of November 2, 1948) be recommitted to the Committee on House Administration with instructions (1) to allow, under the rules of the subcommittee on elections and the precedents established by the House of Representatives, the contestant and his attorney to inspect the poll lists, registration books, ballot boxes, ballots, tally sheets, and statements of returns pertaining to this contested election, and (2) that after said inspection, to direct the parties to this contest, under such rules as the committee may determine, to take testimony and return the same, as required by the rules of the subcommittee on elections and laws (2 U.S. Code 201–226) governing contested-election cases and the precedents established by the House of Representatives (*Stolbrand v. Aiken* (Hinds' I, 719); *Goodwyn v. Cobb* (Hinds' I, 720); *Greevy v. Scull* (Hinds' II, 1044); *Steele v. Scott* (Cannon's VI, 126); *Galvin v. O'Connell* (Cannon's VI, 146); *Kunz v. Granata* (Cannon's VI, 186)).

Mr. Cavalcante thereupon yielded to Mr. Harrison, who immediately moved the previous question on the substitute resolution, which was rejected by voice vote.

House Resolution 503 was then agreed to without debate and by voice vote. House Resolution 503 declared:

> *Resolved,* That William W. Blackney was elected a Representative in the Eighty-first Congress from the Sixth Congressional District of the State of Michigan and is entitled to a seat as such Representative.

*Note:* Syllabi for Stevens v Blackney may be found herein at § 7.7 (magistrates' authority to open ballot boxes); § 29.3 (ballots as "papers" required to be produced); § 34.2 (necessity of producing evidence); § 36.8 (effect of absence of witnesses for contestant); § 39.3 (unsupervised recount); § 40.2 (justification for recount); § 40.4 (burden of showing fraud, irregularity or mistake); § 41.3 (production of evidence justifying a recount as prerequisite) § 42.18 (substitute resolutions); § 43.9 (minority reports).

### § 55.4 Thierry v Feighan

On Aug. 11, 1949, Mr. Thomas B. Stanley, of Virginia, submitted

**13.** 96 CONG. REC. 7544, 81st Cong. 2d Sess.; H. Jour. 434, 435.

**14.** *Id.*

the unanimous report[15] of the Committee on House Administration in the contested election case of Thierry v Feighan from the 20th Congressional District of Ohio. The report also contained committee recommendations in the contested election cases of Browner v Cunningham, Fifth Congressional District of Iowa, and of Fuller v Davies, 35th Congressional District of New York. Contestee's answer, filed with the Clerk for information only, had been contained in the Clerk's letter[16] transmitted to the Speaker on July 26, 1949, and laid before the House on that date. The letter recited that no testimony had been received during the period required by statute, and that the contest appeared abated. The Clerk's letter, upon being referred, was ordered printed with accompanying papers.

The summary and unanimous report from the Committee on House Administration stated that:

> Under the laws and committee rules governing contested-election cases in the House of Representatives, more than 90 days elapsed since the filing of notice to contest the elections of the respective contestees in the above-entitled contested-election cases, and no testimony of any character, kind, or nature of the parties in the said contests having been received by the Clerk of the House of Representatives in behalf of the contestants in support of the allegations set forth in their notice of intention to contest said election.
>
> It is hereby respectfully submitted that notice of intention to contest the election in the afore-mentioned cases be dismissed by reason of failure to comply with the laws and committee rules governing contested-election cases in the House of Representatives.

Accordingly, House Resolution 324[17] was called up as privileged by Mr. Stanley and agreed to without debate and by voice vote on Aug. 11, 1949. House Resolution 324 declared:

> *Resolved*, That the election contest of Vincent L. Browner, contestant, against Paul Cunningham, contestee, Fifth Congressional District of the State of Iowa, be dismissed, and that the said Paul Cunningham is entitled to his seat as a Representative of said district and State; be it further
>
> *Resolved*, That the election contest of Hadwen C. Fuller, contestant, against John C. Davies, contestee, Thirty-fifth Congressional District of the State of New York, be dismissed and that the said John C. Davies is entitled to his seat as a Representative of said district and State; and be it further
>
> *Resolved*, That the election contest of James F. Thierry, contestant, against

**15.** H. Rept. No. 1252, 95 CONG. REC. 11316, 81st Cong. 1st Sess.; H. Jour. 831.

**16.** H. Doc. No. 279, 95 CONG. REC. 10248, 81st Cong. 1st Sess.; H. Jour. 751.

**17.** 95 CONG. REC. 11294, 81st Cong. 1st Sess.; H. Jour. 830.

Michael A. Feighan, contestee, Twentieth Congressional District of the State of Ohio, be dismissed and that the said Michael A. Feighan is entitled to his seat as a Representative of said district and State.

## § 56. Eighty-second Congress, 1951–52

### § 56.1 Huber v Ayres

Mr. Omar T. Burleson, of Texas, submitted the majority report[18] on Aug. 21, 1951, in the contested election case of Huber v Ayres, from the 14th Congressional District of Ohio. The case had been presented to the House on July 11, 1951, on which date the Speaker had referred to the Committee on House Administration and ordered printed a letter from the Clerk[19] transmitting the required papers and testimony pursuant to 2 USC §§ 201 et seq. The record showed that there had been three candidates in the election held Nov. 7, 1950, and that contestee (Mr. Ayres) had received a plurality of 1,921 votes over the contestant (102,868 to 100,947, the independent candidate having received 7,246 votes).

The contestant "alleged a failure on the part of the county boards of elections to rotate properly the names of the three candidates on the general election ballot as required by section 2 (a) of article V of the Ohio Constitution." As a result of this failure contestant requested that the election be declared void or that he be seated as the elected member. The committee ruled that "the matter of rotating the names on the ballot is a procedural requirement of the State election process and a matter which Congress has consistently left for the States to determine." Under section 4 of article I of the United States Constitution, state legislatures are left free to determine times, places, and manner of elections for Congress, subject to alteration by congressional regulation. As Congress had only seen fit to regulate the date on which congressional elections were to be held, and to regulate the form of the ballots to be used (2 USC §§ 7, 9), the majority proceeded to apply state law, namely the constitutional provision which:

> . . . [R]equires that the names of all candidates shall be so alternated that each name shall appear (insofar as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs (Ohio Constitution, art. V, § 2a, adopted Nov. 8, 1949).

18. H. Rept. No. 906, 97 CONG. REC. 10494, 82d Cong. 1st Sess.; H. Jour. 645.

19. H. Doc. No. 189, 97 CONG. REC. 8015, 82d Cong. 1st Sess.; H. Jour. 479.

The committee majority then ruled that the contestant had not exhausted the remedies available to him under state law, as he had not requested remedial action by protesting the form of the ballots to the board of elections. The majority report cited state law requirements which provided for the publication and display of ballots for a 24-hour period before the election, with notice to committees representing each party on the ballot to permit them to inspect the ballots for irregularities. The report then stated:

> Apparently, if objections were entertained by the contestant to errors in the form of the ballots or ballot labels, he had adequate recourse under Ohio law to request remedial action by protesting to the board of elections. In event he failed to secure satisfaction from the boards, he had recourse to the State courts. Failing to exhaust the remedies available to him under State law, the final election having been held, with no allegations or evidence of fraud, and the results proclaimed, the committee is of the opinion that the results of that election cannot be overturned because of some preelection irregularity.

Thus, the majority noted that there had been discrimination against contestant in the rotation method employed, but that contestant had not exhausted his state remedies, and that the discrimination may have been due to the failure of the Ohio legislature to implement the constitutional provision.

The dissenting views were signed by Mr. Wayne L. Hays, of Ohio, Mr. Charles R. Howell, of New Jersey, Mr. Edward A. Garmatz, of Maryland, Mr. Reva Beck Bosone, of Utah, and Mr. Victor L. Anfuso, of New York. These members of the committee first pointed out that the constitutional provision needed no new implementing legislation to be fully effective, nor had its adoption effected the repeal of a state law which required voting machine rotation of ballots. These dissenting members then argued that contestant had not been granted a fair chance by state law to discover the mistake of the election officials in time to assure correction by the officials or by state courts. The minority took particular exception to the adequacies of state remedial procedures as they were interpreted by the majority. The majority, in taking the position that the Ohio law requirements, as to the alternation of names on ballots and as to publication of ballots and display for 24 hours, were mandatory before the election but only directory afterward, was unsound, contended the minority, as it was impossible for the contestant to ascertain the unequal method of ro-

tation in advance of the election in time to invoke state law remedies. The minority then cited the Ohio Supreme Court decision of *Otworth* v *Bays* (1951), 155 Ohio 366, 98 N.E.2d 812, for the proposition that the irregularities in the instant case would render the election invalid because such irregularities "affect the result of the election or render it uncertain." The minority also cited the Kentucky Supreme Court case of *Lakes* v *Estridge* (1943), 294 Kentucky 655, 172 S.W.2d 454, which invalidated an election for failure, among other reasons, to rotate the names of candidates on the ballots as required by state law. Thus, the minority claimed that evidence had been produced which gave contestant a substantial plurality, assuming a correct rotation of names on ballots.

Nevertheless, Mr. Burleson called up as privileged House Resolution 400[20] on Aug. 21, 1951, which the House agreed to without debate by voice vote. House Resolution 400 provided as follows:

> *Resolved*, That William H. Ayres was duly elected as Representative from the Fourteenth Congressional District of the State of Ohio to the Eighty-second Congress and is entitled to his seat.

**20.** 97 CONG. REC. 10479, 82d Cong. 1st Sess.; H. Jour. 644.

*Note:* Syllabi for Huber v Ayres may be found herein at § 7.1 (appeal to state court regarding preelection irregularities); § 10.9 (distinction between mandatory and directory laws); § 12.8 (balloting irregularities) .

### § 56.2 Karst v Curtis

On Aug. 21, 1951, the unanimous report[1] from the Committee on House Administration in the contested election case of Karst v Curtis, from the 12th Congressional District of Missouri, was submitted by Mr. Omar T. Burleson, of Texas. The contest had been presented to the House on Apr. 12, 1951, when the Speaker laid before the House a letter from the Clerk[2] of the House transmitting communications relative to the contest. The Clerk's letter related that time for taking testimony appeared expired and that no testimony had been received by his office. The Speaker referred the communication to the Committee on House Administration and ordered it printed as a House document to include the following material: (1) contestant's notice of contest filed with the

**1.** H. Rept. No. 905, 97 CONG. REC. 10494, 82d Cong. 1st Sess.; H. Jour. 645.

**2.** H. Doc. No. 111, 97 CONG. REC. 3800, 3801, 82d Cong. 1st Sess.; H. Jour. 256.

Clerk for information only; (2) contestee's answer to said notice filed for information only; (3) contestee's motion to dismiss for failure of contestant to take testimony within 40 days after service of answer; (4) a memorandum from contestant explaining his failure to take testimony within the 40 days; and (5) contestee's renewed motion to dismiss for failure of contestant to take testimony during the 90-day statutory period.

On June 7, 1951, the Speaker laid before the House a further communication[3] from the contestant, which related that he had been requested by a unanimous vote of the County Democratic Committee of St. Louis County, based on charges of improper tallying of ballots in a local election, to file his notice of recount of votes cast for a Member of Congress in the same election. Based upon the recount of votes in the local election which failed to disclose the irregularities suggested by the county committee, contestant informed the House of his decision to discontinue any further action in the contest for the seat from the 12th Congressional District. The alleged discrepancy had represented 15 percent of the total votes cast in the congressional election, of which contestee had received 110,992 votes to 106,935 for contestant. The Speaker referred this communication to the Committee on House Administration and ordered it printed.

The committee report related that "no testimony was taken or forwarded to the Clerk of the House in this case as required by sections 203, 223, of title 2, United States Code."

Accordingly, the committee recommended the adoption of House Resolution 399,[4] which was called up as privileged by Mr. Burleson and agreed to without debate and by voice vote on Aug. 21, 1951. House Resolution 399 stated:

> *Resolved,* That the election contest of Raymond W. Karst, contestant, against Thomas B. Curtis, contestee, Twelfth Congressional District of the State of Missouri, be dismissed.

*Note:* Syllabi for Karst v Curtis may be found herein at § 6.4 (items transmitted by Clerk); § 25.4 failure to produce evidence); § 33.3 (withdrawal of contests).

### § 56.3 Lowe v Davis

Mr. Omar T. Burleson, of Texas, submitted the unanimous re-

3. H. Doc. No. 160, 97 CONG. REC. 6241, 82d Cong. 1st Sess.; H. Jour. 388.

4. 97 CONG. REC. 10479, 82d Cong. 1st Sess.; H. Jour. 644.

port[5] of the Committee on House Administration on Aug. 21, 1951, in the contested election case of Lowe v Davis, from the Fifth Congressional District of Georgia. The report indicated that contestant had been defeated by contestee in the primary election, and had not been a candidate and had not received any votes in the general election. The report stated that:

> Nothing in the record indicates that the contestee was guilty of any acts in connection with that primary which would disqualify him for office of United States Representative in Congress. [Citing the contest of Miller v. Kirwan, 77th Congress (H. Res. 54).]

The report indicated that contestant had filed a record in the contest with the Clerk, but that contestant had not taken testimony within the time prescribed by 2 USC § 203.

There was no record of referral of a letter from the Clerk transmitting the contest to the committee, nor did the House adopt a resolution referring the contest to the committee. As well, there is no record that the contestant petitioned the Congress to take action in this matter.

House Resolution 398[6] was called up as privileged by Mr. Burleson and agreed to without debate and by voice vote on Aug. 21, 1951. House Resolution 398 stated:

> *Resolved,* That the election contest of Wyman C. Lowe, contestant, against James C. Davis, contestee, Fifth Congressional District of the State of Georgia, be dismissed.

*Note:* Syllabi for Lowe v Davis may be found herein at § 19.5 (contestants as candidates in general election); § 27.3 (dismissal for failure to take testimony within statutory period); § 43.3 (form of report).

### § 56.4 Macy v Greenwood

On Apr. 2, 1951, the Speaker laid before the House, ordered printed, and referred to the Committee on House Administration a letter from the Clerk of the House[7] transmitting a stipulation signed by attorneys for the contestant and the contestee in the contest of Macy v Greenwood, from the First Congressional District of New York. The stipulation related that the contestant had, at the contestee's request, adjourned the calling of two witnesses for six days during the 40-day period allotted contestant for the taking of testimony under 2 USC §§ 201 et

**5.** H. Rept. No. 904, 97 CONG. REC. 10494, 82d Cong. 1st Sess.; H. Jour. 645.

**6.** 97 CONG. REC. 10479, 82d Cong. 1st Sess.; H. Jour. 644.

**7.** H. Doc. No. 104, 97 CONG. REC. 3123, 82d Cong. 1st Sess.; H. Jour. 227.

seq. Both parties had thus agreed to a compensatory extension of six days subsequent to the 40-day period, subject to approval of the House. That approval was granted by the House, when, on Apr. 12, 1951, Mr. Thomas B. Stanley, of Virginia, submitted the committee report[8] and called up House Resolution 184[9] as privileged. The resolution was agreed to upon assurance by Mr. Stanley that there would be no further extensions of time. House Resolution 184, having been agreed to by voice vote, provided as follows:

> *Resolved*, That the time allowed for taking testimony in the election contest, W. Kingsland Macy, contestant, against Ernest Greenwood, contestee, First Congressional District of the State of New York, shall be extended for a period of 6 days.
>
> That the time allowed for taking of testimony by the contestant shall be extended for a period of 6 days beginning April 16, 1951, and ending April 21, 1951.

During the time permitted by statute for contestee to take testimony, the contestee transmitted to the Clerk his motion to "close the hearing and print the record." The Speaker laid the Clerk's letter[10] before the House on May 17, 1951, and had ordered it printed to include contestee's motion. The motion was based upon contestee's assertion that he would rely on the testimony adduced by contestant, thereby obviating the need to take testimony of his own. Contestee also desired to have the contest resolved during the first session of the 82d Congress, prior to the July 31 adjournment date provided in the Legislative Reorganization Act. The Committee on House Administration did not, however, act upon this motion of contestee.

On Mar. 19, 1952, Mr. Omar T. Burleson, of Texas, submitted the unanimous committee report[11] recommending adoption of House Resolution 580.[12] Contestee (Mr. Greenwood), had received 76,375 votes to 76,240 for the contestant (Mr. Macy), a plurality of 135 votes, in the Nov. 7, 1950, election. In addition to contestant's notice of contest filed under the laws governing contested election cases, contestant had filed a sworn complaint with the "Special

**8.** H. Rept. No. 315, 97 CONG. REC. 3807, 82d Cong. 1st Sess.; H. Jour. 254.

**9.** 97 CONG. REC. 3751, 82d Cong. 1st Sess.; H. Jour. 254.

**10.** H. Doc. No. 135, 97 CONG. REC. 5483, 82d Cong. 1st Sess.; H. Jour. 341, 343.

**11.** H. Rept. No. 1599, 98 CONG. REC. 2545, 82d Cong. 2d Sess.; H. Jour. 187.

**12.** 98 CONG. REC. 2517, 82d Cong. 2d Sess.; H. Jour. 186.

Committee to Investigate Campaign Expenditures for the House of Representatives, 1950," which committee had been created by the 81st Congress and had been directed to report to the House by Jan. 3, 1951, concerning the campaigns. That committee (the "Mansfield Committee") found that the votes in this election had been fairly tabulated. The committee report and files were given to the Committee on House Administration in the event that a contest was filed.

The contestant alleged that 2,790 illegal votes had been cast and counted. He claimed that 932 voters were not qualified as to residence, for the reason that they had entered the district and had voted although they had not been "for the last four months a resident of the county . . . in which he . . . may vote" (as required by state law). Contestant argued that the four-month period for residence began to run on the date when the voter actually moved into the district rather than on the date of the signing of the contract to purchase the house. The committee found that the board of election commissioners had relied on a court case handed down by a county court within the election district, which had construed the term "residence" to begin to run on the date of the contract for purchase of the home, rather than on the date the voter moved into the premises. The committee report could not cite a case:

> . . . [W]herein the House had rejected votes as illegal for the reason that the voter had not resided in the county for the statutory period of time, although votes have been rejected where voters voted in the wrong district. It is apparently the settled law of elections that where persons vote without challenge they are presumed to be entitled to vote and that the election officers receiving the votes did their duty properly and honestly. [Citing the election contest of Finley v. Bisbee (2 Hinds' Precedents § 933).]

The committee further found that no challenges were made under provisions of New York law which permitted challenging of voters at time of registration or of voting. Contestant's only efforts to ascertain discrepancies involved a recanvass of the vote under the supervision of the "Mansfield Committee" referred to above, and a summary proceeding brought in state court, both of which had failed to disclose any irregularities in the official tabulation, but which had not passed upon the allegations and issues raised in this contest.

The committee did state that had it found "the 932 votes illegally cast, the votes presumably would be deducted proportionally

from both candidates, according to the entire vote returned for each. This is the general rule when it cannot be ascertained for which candidate the illegal votes were cast."

The contestant further alleged that 841 voters voted when the registration books showed only 684 names entered as registered on election day; 79 names entered below the red line signifying entry after the end of registration; 45 names entered without any date; 13 voters having higher numbers than the highest number certified for that district; 20 voters having subdivided registration numbers. The committee found that as for the 79 persons whose names were entered under the red line, it is presumed that these persons were properly registered on election day (rather than on either of two earlier registration days), as permitted by state law. The committee further found that "in the absence of fraud, the remaining charges of irregularities as to registration and the failure of election officials to assign ballot numbers to electors will not invalidate the votes cast."

Regarding contestant's allegation that contestee had violated the Federal and State Corrupt Practices Acts, the committee found no evidence that the extra editions of "Newsday" which had been devoted exclusively to the defeat of the contestant, had been financed or inspired by conduct of contestee.

On Mar. 19, 1952, Mr. Burleson called up House Resolution 580 as privileged. The House agreed to the resolution without debate and by voice vote, as follows:

> *Resolved,* That Ernest Greenwood was duly elected as Representative from the First Congressional District of the State of New York to the Eighty-second Congress and is entitled to his seat.

*Note:* Syllabi for Macy v Greenwood may be found herein at § 7.4 (state court determinations as controlling); § 10.16 (violations and errors by election officials); § 11 2 (financing extra editions of magazines); § 27.15 (stipulation by parties for extension of time); § 34.1 (collecting evidence for future use); § 36.10 (effect of failure to challenge voter); § 37.5 (method of proportionate deduction).

### § 56.5 Osser v Scott

In the election for United States Representative from the Third Congressional District of Pennsylvania, held on Nov. 7, 1950, the contestee, Hardie Scott, received 68,217 votes to 67,286 votes for the contestant, Maurice S. Osser, a plurality of 931 votes. Contestant filed timely notice of his in-

tention to contest the election, claiming that "fraud, and irregularities were committed both before the election by permitting persons to register or failing to cancel the registration for persons not qualified and on election day by permitting unregistered persons to vote and through other irregularities." Contestant claimed that such irregularities were caused by failure of a "Republican dominated Philadelphia County Board of Elections" and a similarly constituted registration commission to perform their duties, i.e., to cancel the registrations of persons who did not actually reside in the precincts involved. Contestant also complained that he was unable to secure watchers and overseers who truly represented his party and who resided in the districts wherein they acted.

The contest was presented to the House on Oct. 10, 1951, on which date the letter from the Clerk of the House[13] transmitting the relevant papers was referred to the committee and ordered printed. Contestant's testimony enumerated instances where persons had registered, giving fictitious addresses as residences, and against which registrants contestant had filed "strike off petitions" (some 2,000 in number). The committee, in its unanimous report[14] submitted by Mr. Omar T. Burleson, of Texas, on Mar. 19, 1952, found that "no direct testimony was presented to the committee showing that any of the persons claimed to have been illegally registered and to have voted had been actually interrogated by the contestant or his counsel." The committee found that no evidence had been presented to show that any of the illegal registrants had voted for the contestee. The committee concluded that the contestant had not presented sufficient evidence to impeach the returns, stating in its report as follows:

> [W]here contestant asks the committee to reject votes for the reason that they were illegally cast by persons not residing where they claimed to reside, the committee requires such evidence as to leave no doubt.

The committee found that contestant had not presented any evidence to establish misconduct on the part of the election officials. The committee report cited provisions of state law which established district election boards con-

**13.** H. Doc. No. 253, 97 CONG. REC. 12908, 82d Cong. 1st Sess.; H. Jour. 772.

**14.** H. Rept. No. 1598, 98 CONG. REC. 2544, 82d Cong. 2d Sess.; H. Jour. 187.

sisting of three elected members, two from the majority party in the district, and which established registration commissions of equal party affiliation. The report further related that contestant did not take advantage of a remedy provided by state law in addition to the "strike-off petition," namely, petition by five voters in a district to a county court for the appointment of "overseers" to supervise the election officials and to report to the court. Such overseers were distinguished from "watchers" appointed by political parties, who, contestant claimed, were not "honest-to-goodness Democratic."

As to contestant's claim regarding failure of the Democratic Party to appoint suitable watchers and to present suitable candidates for election board member, the committee would not decide, "the general maxim (being) that every official is presumed to do his duty."

Accordingly, Mr. Burleson called up House Resolution 579[15] as privileged on Mar. 19, 1952. Upon adoption of the resolution without debate and by voice vote, the contestee, Mr. Scott, was held entitled to his seat. House Resolution 579 provided that:

> *Resolved,* That Hardie Scott was duly elected as Representative from the Third Congressional District of the State of Pennsylvania to the Eighty-second Congress and is entitled to his seat.

*Note:* Syllabi for Osser v Scott may be found herein at §§ 35.5, 35.6 (burden of showing results of election would be changed); § 36.2 (official returns as presumptively correct).

## § 57. Eighty-fifth Congress, 1957–58

### § 57.1 Carter v LeCompte

Mr. Karl LeCompte was re-elected as Representative from the Fourth Congressional District of Iowa at the election held Nov. 6, 1956, having received, according to the official state canvass, 58,024 votes to 56,406 votes for Steven V. Carter, a plurality of 1,618 votes. This result was officially "determined" on Dec. 10, 1956. Contestant personally served contestee with notice of contest on Dec. 17, though he had on Nov. 24 served contestee by "substituted service" prior to "determination" of the result. The committee in its majority report decided that the subsequent personal service "rendered moot any question as to sufficiency of the service contemplated by 2 USC § 201," and that it was served on

15. 98 CONG. REC. 2517, 82d Cong. 2d Sess.; H. Jour. 186.

contestee on the 10th day following the official declaration of the results of the election. Contestee filed timely answer on Dec. 20, 1956.

On Jan. 24, 1957, the contestant petitioned the House requesting an additional 20 days in which to take testimony. The petition was transmitted in a letter from the Clerk which the Speaker laid before the House, ordered printed as a House document to include contestant's petition, and which the Speaker referred to the Committee on House Administration on Jan. 29,[16] and was considered by its Subcommittee on Elections on Feb. 5, 1957. The subcommittee considered several House precedents (cited in the final report of the full committee) in which an extension of time had been granted after a showing of reasonable diligence, and no laches, by either the contestant or the contestee. The subcommittee also noted, however, that for insufficient reasons shown, a party to a contest had been denied a requested extension of time. The subcommittee recommended denial in this instance. The unanimous subcommittee opinion was unanimously adopted by the full committee on Feb. 6, 1957, and, being negative, no formal report was made to the House.

On Apr. 17, 1957, contestant filed three motions which were included in a letter from the Clerk which the Speaker ]aid before the House, ordered printed, and referred to the Committee on House Administration.[17] The Subcommittee on Elections recommended that they be denied on May 7, and approval by the full committee of the subcommittee action followed on May 8.

(1) The committee determined that contestant's motion to "amend the pleadings to make them conform to the proof" was premature, as the testimony had not yet been printed and referred to the committee.

(2) The committee ruled that contestant's motion for a "directed verdict" was also premature, as a contrary ruling would be in violation of the rules of the House [Rule XI clause 9(k), *House Rules and Manual* (1973)] which requires contested elections to be referred to the Committee on House Administration, and in violation of 2 USC §§ 201 et seq., which requires testimony to be collected by the Clerk, printed, and laid before the House for reference.

(3) Contestant's motion asking the Committee on House Adminis-

**16.** H. Doc. No. 84, 103 CONG. REC. 1217, 85th Cong. 1st Sess.

**17.** H. Doc. No. 153, 103 CONG. REC. 5941, 85th Cong. 1st Sess.

tration to assume custody of the ballots was also denied. The subcommittee felt that the responsibility for the preservation of ballots, in congressional contests as well as in state or local elections, was with the state. However, the laws of Iowa afforded no mode of preserving ballots cast, as county auditors were required to destroy congressional ballots six months after the election. Thus the committee, while recognizing contestant's right under 2 USC §§ 206, 219 to use the subpena duces tecum "acting through a Federal District Judge or even a notary to require the production and preservation of ballots and other pertinent paraphernalia," directed its chairman to telegraph all county auditors requesting them to preserve all ballots and other papers for possible use by the committee. The request was honored in each county.

The contest was not presented to the House until Aug. 26, 1957, four days prior to adjournment of the first session of the 85th Congress. On that date the letter from the Clerk transmitting the testimony and required papers was referred by the Speaker to the committee, having been laid before the House and ordered printed by the Speaker.[18]

Mr. Robert T. Ashmore, of South Carolina, submitted the report of the majority of the Committee on House Administration on Apr. 22, 1958.[19] The committee first determined that contestant had properly invoked the jurisdiction of the committee, as there was no remedy available to him for either a recount or a contest under state law. Contestee had served copies of his notice of contest on state officials to challenge the applicability of state laws to a congressional contested election. In a written opinion dated Dec. 3, 1956, the Attorney General of Iowa had advised the Governor and Secretary of State that the laws of Iowa contained no provision for contesting a House seat.

The committee, therefore, agreed with the contestant that there was not available to him any forum or tribunal in his state to hear this contest and that he had appropriately presented his case to this committee, through its elections subcommittee, pursuant to Rule XI of the House of Representatives and sections 101–130 of the Revised Statutes of the United States. The committee, in adopting this view, expressly rejected the view of the committee

**18.** H. Doc. No. 235, 103 CONG. REC. 15968, 85th Cong. 1st Sess.

**19.** H. Rept. No. 1626, 104 CONG. REC. 6939, 85th Cong. 2d Sess.

in the contest of Swanson v Harrington in the 76th Congress, which had required the contestant there to show that the Iowa election laws did not permit him a recount when he had not sought recourse to the highest state court regarding the application of state laws to a House contest.

The committee took "judicial notice of the complaints filed by the contestant with the Special House Committee to Investigate Campaign Expenditures, 84th Congress, and the failure of that committee to draw any conclusions whatever as to the allegations of his complaint or to otherwise grant him any relief."

Contestant's major complaints concerned irregularities in the casting of absentee ballots and the use of certain designated voting machines. Contestant alleged widespread miscounting and incorrect tallying of absentee ballots, several fraudulent practices regarding the casting and preservation and delivery of absentee ballots by voters, party workers, and election officials alike throughout the Fourth Congressional District. The majority of the committee found, with respect to the disputed absentee ballots, that violations of the state laws governing absentee voting had been committed by election officials throughout the district, but that contestee had not fraudulently participated in those violations. The majority found that contestant had not shown that he had exhausted his state remedies to prevent improper absentee ballots from being cast or to punish those responsible. As contestant had not proven fraud by contestee and had not challenged absentee ballots under state law, he had not sustained his burden of proving that the election results would have been different. Citing the contest of Huber v Ayres (§ 56.1, supra) in the 82d Congress, the majority determined that contestant had not properly entered objections to errors in the form of the absentee ballots prior to the election, as permitted by Iowa law, and that therefore the results of the election could not be "overturned because of some preelection irregularity."

The minority report of the Committee on House Administration was signed by Mr. George S. Long, of Louisiana, and Mr. John Lesinski, of Michigan. They cited several provisions of the election laws which imposed mandatory duties and criminal sanctions on the election officials, violations of which they contended should void certain absentee ballots or all ballots in counties where ballots had

been commingled and were inseparable. The minority cited the contest of Steel v Scott, 6 Cannon's Precedents § 146, for the proposition that total disregard of election laws by election officials, though absent fraud, was the basis for a recount, which in this contest would show contestant (Mr. Carter) the winner by 1,260 votes.

Contestant alleged that the voting machines in a certain county were not set up to permit voting a straight party ticket by a party lever. The committee could not determine, however, whether any votes had been lost by the contestant because straight party voting was not permitted. The committee decided that contestant had not properly filed his objections to errors as provided by state law, and that the voting machines in question had been used in the fourth congressional district for many years. Contestant had challenged neither the machines nor the tickets used therein.

Finally, the committee pointed out that contestant had not sought a legal opinion from the state attorney general regarding administration of the election laws, which opinion would have been binding on the local election officers. Thus the committee recommended the adoption of House Resolution 533, which declared contestee entitled to his seat.

Mr. Lesinski in his additional dissenting views proposed that the House should consider declaring the seat vacant, which would require the Iowa Governor to call a special election. He cited several precedents of the House to support the proposition that where irregularities make it impossible to determine who has been elected, the seat is declared vacant.

Mr. Ashmore called up as privileged House Resolution 533 on June 17, 1958. Mr. Lesinski took the floor to recommend the minority report to the House and to call attention to the fact that Iowa, as well as Missouri, Maine, and Minnesota, had no legal apparatus for determining the prima facie right of a Member-elect to his seat. Subsequently, House Resolution 533 was agreed to without further debate, and thereby the contestee was held entitled to his seat. House Resolution 533 Provided: [20]

> *Resolved,* That Karl M. LeCompte was duly elected as Representative from the 4th Congressional District of the state of Iowa in the 85th Congress and is entitled to his seat.

*Note:* Syllabi for Carter v LeCompte may be found herein at

**20.** 104 CONG. REC. 11512, 85th Cong. 2d Sess.

§ 5.7 (actions by election committee to preserve evidence); § 5.13 (advisory opinions on state law); § 7.2 (appeal to state court regarding preelection irregularities); § 10.15 (violations and errors by officials as grounds for contest); § 13.5 (failure to exhaust state remedy); §§ 13.6, 13.7 (preelection irregularities); § 18.3 (compliance with statutory requisites for commencing the contest); § 21.1 (substituted service of notice of contest); § 23.1 (motion for directed verdict); § 27.13 (extension of time to take testimony for good cause).

### § 57.2 Dolliver v Coad

On Jan. 16, 1957, the Speaker referred to the Committee on House Administration a letter from the Clerk relating to an election contest and transmitting a communication from the contestee, Merwin Coad. The communication related that Mr. Coad had been certified as Representative from the Sixth Congressional District of Iowa as a result of the election held Nov. 6, 1956, and had been sworn in as a Member of the 85th Congress, and that Mr. Coad had not received written notice of his opponent's intention to contest the election within 30 days after the result had been officially determined. The Clerk's letter was ordered printed to include contestee's communication.[1]

Mr. Robert T. Ashmore, of South Carolina, submitted the unanimous committee report[2] on Apr. 11, 1957, to accompany House Resolution 230. The report stated that the Subcommittee on Elections had met in executive session on Feb. 5, 1957, to consider the sufficiency of both the service of the notice and of the notice itself. No decision being then made, public hearings were held on Feb. 11. Counsel for Mr. Dolliver contended that 2 USC § 201 governing the notice of contest was complied with by leaving a copy of the notice with the wife of the contestee at his home. Counsel argued that Rules 4(d)1 and 56(a) of the Federal Rules of Civil Procedure, which permit such substituted service, should control the question of proper service under 2 USC § 201. The subcommittee, however, did not decide this issue, as they agreed that if the notice were found defective for the reason that it was not signed by contestant, then the question of the sufficiency of the service would become moot.

On Mar. 11, 1957, the Subcommittee on Elections unani-

1. H. Doc. No. 53, 103 CONG. REC. 604, 85th Cong. 1st Sess.
2. H. Rept. No. 343, 103 CONG. REC. 5549, 85th Cong. 1st Sess.

mously decided that notice of contest was not sufficient, as it did not bear the original signature of the contestant. Therefore the subcommittee did not determine whether personal service was required under 2 USC § 201.

Mr. Ashmore called up House Resolution 230 as privileged on Apr. 11, 1957. By agreeing to the resolution without debate,[3] the House (1) resolved that it should not recognize an unsigned paper as valid notice of contest; and (2) resolved that in this case the unsigned notice of contest was not in the form required by 2 USC § 201. House Resolution 230 provided as follows:

> *Resolved,* That it would be unwise and dangerous for the House of Representatives to recognize an unsigned paper as being a valid and proper instrument with which notice may be given to contest the seat of a returned Member. . . . That the unsigned paper by which attempt was made to give notice to contest the election of the returned Member from the Sixth Congressional District of the State of Iowa to the 85th Congress is not the notice required by the Revised Statutes of the United States, title II, chapter 8, section 105.

*Note:* Syllabi for Dolliver v Coad may be found herein at § 22.4 (necessity of signature on notice of contest).

3. 103 CONG. REC. 5501, 5502, 85th Cong. 1st Sess.

## § 57.3 Oliver v Hale

On Aug. 6, 1958, Mr. Robert T. Ashmore, of South Carolina, submitted the unanimous committee report[4] from the Committee on House Administration in the contested election case of Oliver v Hale, from the First Congressional District of Maine. The contest had come to the House on Aug. 29, 1957, when the letter from the Clerk of the House[5] transmitting the required papers was laid before the House, referred by the Speaker to the committee, and ordered printed.

The record showed that the original canvass of votes disclosed a 29-vote plurality for Robert Hale, the contestee, in the election held Sept. 10, 1956. As permitted by state law, the contestant asked for an inspection and recount of all votes cast, which was conducted under the supervision of five two-man teams (with each party represented on each team) and with representatives of the "Special Committee to Investigate Campaign Expenditures of the House of Representatives" present at the recount. At the conclusion

4. H. Rept. No. 2482, 104 CONG. REC. 16481, 85th Cong. 2d Sess.; H. Jour. 838.

5. H. Doc. No. 237, 103 CONG. REC. 16516, 85th Cong. 1st Sess.; H. Jour. 872.

of the recount, contestee requested that a certificate of election be issued to him, to which request the contestant objected. The Governor declined to issue such certificate pending an advisory opinion from the Supreme Court of Maine as to the authority of the Governor to determine the validity of the disputed ballots, and, lacking such authority, whether a certificate should be issued to the apparent winner as determined by the canvass. The Supreme Court advised the Governor that he had no authority to determine validity of disputed ballots, but that he should issue a certificate based on the canvass. Accordingly, the Governor issued the certificate of election to contestee on Dec. 5, 1956.

In contestee's answer to contestant's notice of contest, which notice had been filed on Jan. 2, 1957, contestee claimed that the service of such notice was not timely, i.e., not "within thirty days after the result of such election shall have been determined . . ." as required by 2 USC § 201. In deciding against contestee's claim that the determination date should have been considered as Sept. 26, 1956, the date of the official canvass, the committee ruled that there was no determination under the federal statute above cited until the actual issuance of the certificate to contestee on Dec. 5, 1956.

The report of the "Special Committee to Investigate Campaign Expenditures," referred to above, was submitted Dec. 22, 1956. The majority of that committee recommended that the Committee on House Administration of the 85th Congress immediately investigate the disputed ballots (about 4,000) and report to the House by Mar. 15, 1957. The minority contended that a committee of the 85th Congress should not "purport to dictate to the Committee on House Administration of the 85th Congress how it shall conduct its operations or when it shall file its report."

The Committee on House Administration, on Apr. 30, 1958, adopted a motion to conduct an examination and recount of the disputed ballots, as well as a motion to request counsel for both parties to reduce further, if possible, the number of ballots in dispute. Accordingly, counsel reduced the number to 142 regular ballots and 3,626 absentee ballots in dispute, thus giving contestee a stipulated plurality of 174 votes. The committee first considered the disputed 142 regular ballots. By examining each ballot, and by applying state law which required that a ballot not be counted "if for any

reason it is impossible to determine the voter's choice," the committee determined that 57 votes had been cast for each candidate and that 28 votes could not be ascertained. Thus contestee's plurality remained at 174.

With respect to the 3,626 absentee and physical incapacity ballots, questions arose as to the proper completion of the application and/or envelope by the voter prior to the casting of his ballot, or with subsequent disposition of such material by the election officials. The ballots themselves were in proper form and could be counted for one or the other candidate. Thus, the committee divided contestant's allegations into two classes: (1) alleged violations by the election officials, and (2) alleged violations by the voter.

(1) Alleged violations by election officials consisted of failures of the board of registration to retain the application and/or envelope, or failure of various clerks to send in the application and envelopes along with the absentee ballots. State law required officials at the polls to compare signatures on the envelopes containing the ballots with signatures on the applications attached thereto, and, after a favorable comparison, to deposit the ballots with the regular ballots, and then to preserve the applications and envelopes as the ballots were preserved. The committee proceeded to cite state court opinions which construed similar violations of Maine election laws. The report quoted at length an advisory opinion, *Opinion of the Justices* (1956), 152 Me. 219, 130 A.2d 526, as follows:

> We conclude that the provisions of the statute touching the procedure to be employed at the polls and the disposition of applications and envelopes following an election are *directory and not mandatory in nature.* In other words, violation of the statute by election officials in the situations here under consideration, at least in the absence of fraud, is not a sufficient ground for invalidating ballots.

The committee applied such construction and did not invalidate those ballots which had been improperly handled due to actions by election officials.

(2) The contestant alleged nine separate types of violations by voters themselves in complying with the state absentee voting laws (including unsigned ballots, physical incapacity ballots not certified by physicians, envelopes not signed or notarized, jurats not in proper form, identical names of voter and official giving oath, variance in signatures on application and on envelope, voters either not registered or not qualified to vote, and failure of voters to specify

reason for absentee voting on envelope).

Following a discussion of the required procedure for absentee voting in Maine, the committee cited state court decisions which distinguished between acts of the voter and acts of election officials, and which required the voter to substantially comply with the statute in order for his vote to be considered as properly cast. [*Opinion of the Justices* (1956), 152 Me. 219, 130 A.2d 526; *Miller* v *Hutchinson* (1954), 150 Me. 279, 110 A.2d 577.] Thus, the committee determined that 109 absentee and physical disability ballots should be rejected, but that there was no possible way of relating the invalid absentee voting material to the particular ballots cast by those voters. The committee, therefore, sought an equitable method of deducting 109 absentee ballots from the totals of the contestant and contestee.

The committee applied the test prescribed in the election contest of Macy v Greenwood (§ 56.4, supra) in the 82d Congress, which method presupposes that each candidate received invalid ballots in the same proportion that he received his total vote in the election precinct. Thus, by dividing the number of absentee votes received by a candidate in a precinct by the total number of absentee votes cast in that precinct, and by then multiplying the fraction thereby obtained, by the number of absentee votes rejected in the precinct, the committee determined that 86 votes should be deducted from contestee's total, and 23 votes from contestant's total. The final result showed a 111-vote plurality for the contestee.

Accordingly, on Aug. 12, 1958, Mr. Ashmore called up as privileged House Resolution 676,[6] which the House agreed to without debate. Thereby, the contestee, was held entitled to his seat. House Resolution 676 provided as follows:

> *Resolved,* That Robert Hale was duly elected as Representative from the First Congressional District of the State of Maine in the Eighty-fifth Congress and is entitled to his seat.

*Note:* Syllabi for Oliver v Hale may be found herein at § 5.3 (overlapping jurisdiction of committee); § 5.10 (committee power to examine and recount disputed ballots); § 7.3 (advisory opinions by state courts); §§ 10.7, 10.8 (distinction between mandatory and directory laws); § 12.7 (balloting irregularities); § 20.5 (commencement of statutory 30-day period); § 37.4 (method of proportionate

**6.** 104 CONG. REC. 17119, 85th Cong. 2d Sess.; H. Jour. 858.

deduction); § 38.2 (voter intention as paramount concern in interpreting ballot); § 39.4 (recount pursuant to state law, with House supervision).

## § 58. Eighty-sixth Congress, 1959–60

### § 58.1 Investigation of right of Dale Alford to a seat.

During the organization of the House of Representatives of the 86th Congress on Jan. 7, 1959, a single objection having been made to the oath being administered to the Member-elect, Dale Alford from the Fifth Congressional District of Arkansas, Mr. Alford was asked by the Speaker, under the precedents, to stand aside while the other Members and Delegates-elect were sworn. Thereupon the House agreed to House Resolution 1.[7] House Resolution 1 provided as follows:

> *Resolved,* That the Speaker is hereby authorized and directed to administer the oath of office to the gentleman from Arkansas, Mr. Dale Alford.
>
> *Resolved,* That the question of the final right of Dale Alford to a seat in the 86th Congress be referred to the Committee on House Administration, when elected, and said committee shall have the power to send for persons and papers and examine witnesses on oath in relation to the subject matter of this resolution.

The previous question was immediately ordered on the resolution, at which time Mr. Thomas P. O'Neill, Jr., of Massachusetts, propounded a parliamentary inquiry as to whether 40 minutes of debate would be permitted on the resolution, there having been no debate prior to the adoption of the previous question. Speaker Sam Rayburn, of Texas, replied that "under the precedents, the 40-minute rule does not app]y before the adoption of the rules." The resolution was thereupon agreed to by voice vote and without further debate which authorized the Speaker to administer the oath to Mr. Alford, and which referred to the Committee on House Administration the question of the final right of Dale Alford to the seat. The committee was authorized to send for persons and papers and to examine witnesses under oath.

On Apr. 15, 1959, the committee adopted a motion making it mandatory for the committee to investigate the election, and requesting the federal authorities in possession of the ballots and other documents to release them to the committee. To facilitate the investigation, the Subcommittee on Elections traveled to Little Rock, Arkansas, to take physical cus-

7. 105 CONG. REC. 14, 86th Cong. 1st Sess.

tody of the ballots and other materials.

The subcommittee examined all ballots cast in the election, as a result of which 3,409 ballots were isolated as "questionable" and were sent to Washington, D.C., for examination by the full committee. Prior to consideration of the questionable ballots, the subcommittee considered the issue of the validity of write-in votes and determined that all ballots would be considered as valid where the name of the write-in candidate had been properly written in or placed on the ballot by sticker. (Mr. Alford had been elected as a "Democratic write-in candidate" over Brooks Hays, the nominee of the Democratic Party.) The subcommittee disregarded an uncertainty which existed in state law with respect to write-in votes in general elections, and decided that the will of the voters should not be invalidated by an uncertainty in state law. The committee noted that it had been the custom in Arkansas to accept write-in votes, that spaces had been provided on the ballots for write-in votes, and that the House of Representatives had always recognized the right of a voter to write in the name of his choice.

Regarding the use of stickers bearing Dale Alford's name in lieu of the write-in vote, the subcommittee determined that an opinion of the state attorney general, issued on Oct. 30, 1958, to the effect that stickers are legal, was binding on the clerks and judges and that they were required to count the sticker votes. Neither Mr. Hays nor any voter had appealed from the opinion of the attorney general. The subcommittee further determined that it should not void ballots in those precincts where stickers were distributed at the polls, since the state did not have a law prohibiting such distribution and in view of the fact that the Arkansas Supreme Court had ruled in 1932 that ballots bearing stickers distributed at the polls were legal. The report cited the Massachusetts contest in the 66th Congress of Tague v Fitzgerald (6 Cannon's Precedents § 96), in support of the proposition that the use of stickers in balloting should not void the ballots involved. The subcommittee unanimously recommended, however, that the Arkansas legislature should clarify the use of stickers and write-in voting in general.

The subcommittee investigation was conducted as a result of charges made by a single voter from the district, many of the charges made on the basis of

hearsay. The losing candidate, Brooks Hays, offered to assist in an investigation, although he did not file a contest under the statute governing contested elections (2 USC §§ 201 et seq ). The committee report[8] expressed its strong preference for contesting congressional elections by following the procedures outlined in the statute cited above.

As the result of the subcommittee investigation conducted in Arkansas, the subcommittee determined that the questionable ballots presented 16 distinct categories. The subcommittee considered separately the issues raised by each of the 16 categories.

(1) The subcommittee ruled that each of the 48 ballots which did not have stubs detached were invalid. Citing the Arkansas statute which required the voter to detach the stub from the ballot and to deposit it separately, the subcommittee cited a Kentucky case [*State Board of Election, Commissioners* v *Coleman* (1930), 235 Ky. 24, 295 S.W.2d 619] in which the court ruled that the "depositing of the ballot without first detaching the stub would destroy the constitutional requirement for secrecy of the ballot if such ballot is counted, and such requirement is mandatory."

(2) The subcommittee ruled that the 415 ballots which had the name of a write-in candidate written in, or placed on the ballot by sticker, but which did not contain any mark in the box opposite the name, were valid. The report cited the contest of Tague v Fitzgerald (6 Cannon's Precedents § 96) as the only case in which the Committee on House Elections had ever ruled on disputed ballots of this type. In that case the committee had ruled that a cross was not necessary to the validity of the ballots, stating (as quoted by the subcommittee in the instant case):

> No other candidate for Congress was voted for on such ballots. In the absence of a provision expressly rendering such a ballot void in the (state) and in the absence of a reported state case on that point, the committee held that the intention of the voter to vote for (Tague) was manifest by affixing a sticker or writing a name, notwithstanding that the act had not been completed by the making of a cross thereafter.

The subcommittee cited several subsequent cases from courts of other states [*Rollyson* v *Summers County Court* (1932), 113 W. Va. 167, 167 S.E. 83; *Sawyer* v *Hart* (1916), 194 Mich. 399, 160 N.W. 572; *Burns* v *Rodman* (1955), 342

**8.** H. Rept. No. 1172 submitted Sept. 8, 1959, 105 CONG. REC. 18610, 18611, 86th Cong. 1st Sess.

Mich. 410, 70 N.W.2d 793] to substantiate the "general rule" that the intent of the voter can be ascertained and a vote is valid even though the voter fails to mark a cross in the square provided.

(3) The subcommittee ruled that 28 ballots which had the name of a write-in candidate written in, or placed on the ballot by sticker, and which had the box opposite the name of the other candidate marked were invalid, as such a ballot denoted in effect that the voter had voted twice for the same office.

(4) The subcommittee determined that 236 ballots which had the name of the write-in candidate written in and the box opposite checked rather than "Xed" were valid, as the intention of the voter was clear.

(5) The subcommittee ruled that 52 ballots upon which the wrong end of the sticker had been placed were invalid as if not voted at all for either candidate.

(6) The subcommittee considered 88 ballots on which the name of the write-in candidate was either written or placed by sticker in some place on the ballot other than on the write-in line. The subcommittee first determined that 37 ballots, on which the name of the write-in candidate had been written or placed by sticker either in or partially in the congressional box, were valid, but that four ballots which had been voted by scratching or marking a line through the name of Brooks Hays and writing Alford's name on the Hays line were invalid. Of the 47 ballots upon which the write-in name or sticker appeared outside the congressional box, 46 ballots were considered invalid.

(7) There were 1,097 ballots on which the name of the write-in candidate was misspelled or only the last name used. The subcommittee validated all ballots on which the surname had been properly spelled or nearly correctly spelled (1,035) but invalidated those on which the wrong *given* name was written or the surname too incorrectly spelled to show definite intent of the voter (62).

(8) There were 190 ballots apparently intended for the write-in candidate, but containing erasures or other markings. The subcommittee (a) validated 28 ballots apparently voted for the write-in candidate but with Hays' name stricken through (such practice being in accordance with a prior law); (b) invalidated 73 ballots containing write-in votes but also marks in the Hays box which had then been scratched through or

erased; and (c) validated 89 votes where the ballots had additional information such as "5th District" written after the name or sticker.

(9) The subcommittee invalidated 357 ballots on which the box opposite the write-in line was marked by an "X" or check but contained nothing written in or placed on the write-in line. The National Bureau of Standards had reported to the subcommittee that there was "no evidence of any adhesive particles or torn fibers," thus no evidence of fraud.

(10) The subcommittee invalidated seven ballots upon which stickers had been placed over or partially over marks for the other candidate.

(11) The subcommittee validated two ballots on which the voter had written in the name of Brooks Hays, but had not marked an "X" in the box opposite his name. The subcommittee cited a Pennsylvania Supreme Court case (no Arkansas case being in point), which validated ballots similarly cast, the name of the person written in being identical to the name printed on the ballot. In that case, the court had distinguished between such ballots and ballots containing marks beside the printed name as well as write-in votes for the same candidate, which the court considered invalid as a double vote. *James' Appeal* (1954), 377 Pa. 405, 105 A.2d 64.

(12) There were 584 ballots on which the voter had placed a checkmark rather than the "X" prescribed by law, opposite the name of Brooks Hays. As the subcommittee had done in category (4) above, regarding votes cast for the write-in candidate, it ruled these ballots valid, as the intention of the voter was clear.

(13) The subcommittee validated 42 of the 43 ballots on which the voters had placed some mark other than an "X" or check in the square opposite Brooks Hays' name, as the intention of the voter was clear.

(14) 175 ballots contained erasures or other markings which apparently had been counted for Brooks Hays. The subcommittee found that all of these ballots should be invalidated, either on the grounds of potential fraud (erasures of the write-in name and "X"s marked for Brooks Hays, or "X"s for Hays in different form from the other "X"s on the ballot), or due to irregular markings on ballots and failure of voters to avail themselves of new ballots under the "spoiled ballot" provisions of state law.

(15) 74 ballots either were not marked for either candidate, or contained names of persons other

than the write-in candidate. The subcommittee invalidated each of these ballots, as the persons written in had not declared themselves to be write-in candidates within 48 hours before opening of the polls, as required by state law.

(16) The subcommittee invalidated seven ballots which had previously been voided.

(17) Finally, the subcommittee invalidated three ballots where a voter had placed a mark across the entire congressional box, or had torn the top off a ballot, or had torn Mr. Hays' name from the marked ballot.

The subcommittee investigated certain other phases of the campaign and election. It found nothing irregular regarding expenditures by the write-in candidate. It condemned the use of an unsigned pre-election circular by an individual who had distributed information in Mr. A1ford's behalf, apparently without the candidate's knowledge. The subcommittee ruled, however, that the mere existence of an irregularity in any campaign should not be attributed to a particular candidate where he did not participate therein.

The subcommittee refused to consider charges against officials of the Democratic party that they conspired to nullify the will of voters in the Democratic primary, there being no evidence to substantiate the involvement of Mr. Alford in a conspiracy. By the terms of House Resolution 1, the committee was limited in the scope of its investigation to the question of the final right of Dale Alford to his seat in Congress.

The subcommittee disregarded charges that the write-in candidate had represented himself to be a "Democratic" candidate in order to deceive voters. The ballot itself showed that Mr. Hays was the nominated party candidate and that Mr. Alford was a Democrat running as a write-in candidate, his name not being printed thereon.

The subcommittee finally considered and recapitulated alleged errors in tally sheets of various precincts. Thereupon, the final count showed that of the 3,408 questionable ballots, 937 were invalid and not counted. Of the remaining validated ballots, Mr. Alford was credited with 1,843 and Mr. Hays with 628. Dale Alford's final plurality, therefore, was 1,498, having received 30,247 votes to 28,749 for Brooks Hays.

On Sept. 8, 1959, Mr. Ashmore called up as privileged House Resolution 380.[9] Following remarks by the Chairman of the Com-

**9.** 105 CONG. REC. 18610, 18611, 86th Cong. 1st Sess.

mittee on House Administration and by its ranking minority member, the resolution was agreed to on a division vote—ayes 245, noes 5. Thereby, Dale Alford was held entitled to his seat in the 86th Congress. House Resolution 380 provided as follows:

> Whereas the Committee on House Administration has concluded its investigation of the election of November 4, 1958, in the Fifth Congressional District of Arkansas pursuant to House Resolution 1; and
>
> Whereas such investigation reveals no cause to question the right of Dale Alford to his seat in the Eighty-sixth Congress; Therefore be it
>
> *Resolved,* That Dale Alford was duly elected a Representative to the Eighty-sixth Congress from the Fifth Congressional District of Arkansas, and is entitled to a seat therein.

*Note:* Syllabi for the proceedings involving Mr. Alford may be found herein at § 5.9 (actions by election committee to preserve evidence); § 13.2 (candidate's participation in irregularities); §§ 17.1, 17.4 (alternatives to filing election contests); §§ 37.9–37.17 (validity of ballots); § 38.5 (state law as related to voter intention).

### § 58.2 Mahoney v Smith

Mr. Robert T. Ashmore, of South Carolina, submitted the unanimous report of the Committee on House Administration in the contested election case of Mahoney v Smith, Sixth Congressional District of Kansas, on Mar. 21, 1960.[10] The contest had come to the House on June 30, 1959, on which date the Speaker had referred to the committee a communication from the Clerk transmitting the required papers and testimony.[11] Prior to June 30, 1959, the Clerk had transmitted on May 6, 1959, contestee's motion to dismiss the contest,[12] accompanied by contestant's objection thereto and on June 2, 1959, contestant's motion that the House direct the impounding and preservation of all ballots.[13] These communications had been referred by the Speaker on those dates to the Committee on House Administration, and had been ordered printed to include the motions of the parties.

The official abstract showed that contestee had received a plurality of 233 votes, 43,782 to 43,549 for contestant in the election held Nov. 4, 1958. Contestant alleged voting irregularities in four election precincts and irregular casting of within-state absen-

**10.** H. Rept. No. 1409, 106 CONG. REC. 6195, 86th Cong. 2d Sess.

**11.** H. Doc. No. 190, 105 CONG. REC. 12330, 12331, 86th Cong. 1st Sess.

**12.** H. Doc. No. 129, 105 CONG. REC. 7530, 86th Cong. 1st Sess.

**13.** H. Doc. No. 167, 105 CONG. REC. 9571, 86th Cong. 1st Sess.

tee ballots in a certain county which he contended should void the total votes in those precincts, resulting in a 56-vote plurality for contestant. Specifically contestant alleged that an election official had incorrectly marked and counted ballots and that in certain precincts the number of votes cast was greater than the number of voters listed as having voted.

The committee first considered the actions taken by its Subcommittee on Elections regarding contestee's motion to dismiss. The committee concurred in the subcommittee's denial of the motion "for the reason that it was impossible at that early date to evaluate the merits of the case or rule on the testimony. There was no evidence actually then before the committee because the testimony adduced under the contest statute had not yet been printed or transmitted by the Clerk to the committee." The subcommittee did, however, act upon contestant's motion for preservation of the ballots by notifying state officials to preserve ballots despite state law which required their destruction six months after the election. The committee found, however, that certain county clerks had not been officially notified of the pending contest and had destroyed ballots prior to filing of contestant's motion.

The committee ruled that contestant had not proven fraud or irregularities on the part of any election official from the evidence produced nor had he proven that the votes in the election were greater than the number of listed voters. Finally, the committee ruled, with respect to the "within-state absentee ballots," that the witnesses adduced in contestant's behalf were prohibited by state law from being present at the counting of the votes and had no standing to contest the ballot counting.

On Mar. 24, 1960, Mr. Ashmore called up as privileged House Resolution 482 which was agreed to by the House without debate and by voice vote.[14] Thereby the contestee was held entitled to his seat. House Resolution 482 provided as follows:

> *Resolved*, That Wint Smith was duly elected as Representative from the Sixth Congressional District of the State of Kansas in the Eighty-Sixth Congress and is entitled to his seat.

*Note:* Syllabi for Mahoney v Smith may be found herein at § 5.8 (actions by election committee to preserve evidence); § 25.6 (motion to dismiss as premature).

### § 58.3 Myers v Springer

On Apr. 30, 1959, the Speaker laid before the House and referred

**14.** 106 CONG. REC. 6523, 86th Cong. 2d Sess.

to the Committee on House Administration a letter from the Clerk transmitting a communication from Carlton H. Myers which complained about the conduct of the election held Nov. 4, 1958, for Representative from the 22d Congressional District of Illinois. In that communication, Mr. Myers, the defeated Democratic candidate, claimed that his opponent had appointed the editor and owner of a local paper, which paper later supported his opponent and refused Mr. Myers coverage, to a position as acting postmaster, in violation of the Federal Corrupt Practices Act. Mr. Myers also alleged attempts of bribery and coercion against him by representatives of the opposing political party. The Clerk's letter was ordered printed to include the notice of contest copy, which had been filed with that office.(15)

There was no record in the proceedings of the 86th Congress to indicate that contestant complied with the requirements of the laws regulating contested election cases (2 USC §§ 201 et seq.), and no record that the Committee on House Administration had taken action in this contest.

*Note:* Syllabi for Myers v Springer may be found herein at § 18.1 (compliance with statutory requisites).

## § 59. Eighty-seventh Congress, 1961–62

### § 59.1 Roush or Chambers

In 1961, the House conducted an investigation of the question of the right of J. Edward Roush or George O. Chambers, from the Fifth Congressional District of Indiana, to a seat in the 87th Congress, although the case was not one that had been brought pursuant to the contested election statute.

On the organization of the House of Representatives of the 87th Congress on Jan. 3, 1961, Mr. Clifford Davis, of Tennessee, objected to the oath being administered to the Member-elect, George O. Chambers, from the Fifth Congressional District of Indiana, who was then asked by the Chair, under the precedents, to stand aside while other Members-elect and the Resident Commissioner-elect were sworn.

Mr. Davis then submitted the following resolution:(16)

> *Resolved,* That the question of the right of J. Edward Roush or George O.

**15.** H. Doc. No. 123, 105 CONG. REC. 7242, 7265, 86th Cong. 1st Sess.

**16.** 107 CONG. REC. 23–25, 87th Cong. 1st Sess.

Chambers, from the Fifth Congressional District of Indiana, to a seat in the Eighty-seventh Congress be referred to the Committee on House Administration, when elected, and said committee shall have the power to send for persons and papers and examine witnesses on oath in relation to the subject matter of this resolution; and be it further

*Resolved,* That until such committee shall report upon and the House decide the question of the right of either J. Edward Roush or George O. Chambers to a seat in the Eighty-seventh Congress, neither shall be sworn.

Mr. Davis immediately moved the previous question on the resolution, which was ordered by a roll call vote of 252 yeas to 166 nays. The House then agreed to the resolution by division, 205 yeas to 95 nays. Thus the adoption of House Resolution 1 automatically nullified the certificate of election which had been issued by the Governor of Indiana on Nov. 15, 1960, which certified that Mr. Chambers had been elected by a 12-vote majority out of 214,615 ballots cast.

Upon election and organization of the Committee on House Administration, its Subcommittee on Elections, acting pursuant to a motion adopted by the full committee to conduct a complete recount of ballots, proceeded to the Fifth Congressional District of Indiana to conduct the required investigation and recount. The actual counting of ballots and auditing of returns was accomplished by 13 auditors of the General Accounting Office assigned to the committee. The counting procedures as prescribed by the committee were as follows: (1) examination and removal of all material pertinent to the congressional election; (2) separation of materials by category; (3) counting of ballots by categories; (4) recorded count by category for each precinct; (5) packaging and labelling all materials to be retained and removed from counties by committee; (6) recording data from precinct audit sheets on summary analysis sheets for each county; (7) summarizing county totals on analysis; and (8) returning remaining material to precinct container.

Prior to the counting by the committee auditors, the subcommittee had met in executive session to establish the following criteria for classifying ballots examined and categorized by the auditors:

A. Regular ballots:

1. Paper ballots were considered regular if, among other requirements, they were (a) marked with a blue pencil for "nonabsentee" ballots; (b) marked by a clearly defined "X"—two discernible lines

crossing at any angle; (c) and marked by two initials on the lower left of the reverse side.

2. All machine ballots, determined from reading the voting machine registers assigned to the respective candidate, were classified as regular.

B. Questionable ballots (all ballots not meeting the criteria established for regular ballots) were characterized by:

1. Any mark other than an acceptable mark.

2. Any apparently distinguishing mark, erasure, or strikeover.

3. A mark made other than with blue pencil for nonabsentee ballots.

4. A mark not in the proper place, as lines not crossing within a box.

5. Multiple markings for the same office.

6. Ballots without proper markings on the reverse side, lower left corner.

C. Absentee ballots, regular or questionable: the same criteria as above were applied except:

1. Marking was permissible with any color ink or pencil, and

2. Ballots were examined for seal and signature or initials of county clerk on reverse side in lower left corner.

D. Ballots with no votes for Congressman.

In its initial investigation conducted in the Fifth Congressional District of Indiana, the subcommittee also examined and retained absentee and nonabsentee ballots which had not been counted by precinct officials, as well as all other materials relevant to the congressional election. Voters' poll lists and tally sheets were compared with certificates of total votes cast, and discrepancies noted.

The Subcommittee on Elections, meeting in executive session on Mar. 15, 1961, in Washington, directed that ballots classified as questionable or questionable absentee ballots or ballots not counted by precinct officials, be held by the committee for further review. (Regular ballots, determined as such during the first investigation, were not held for further review.) The above categories were further classified into 30 subcategories. The subcommittee, considering the lack of uniformity in the interpretation of the Indiana election laws by various local officials, adopted, on Apr. 12, 1961, a motion designed to achieve uniformity. The adoption of such motion resulted in several actions taken by the Subcommittee on Elections which were not consistent with Indiana statutes and court opinions in point. One effect

of the adoption of these rules was validation of the ballots marked with some instrument other than a blue pencil, some of which had been counted and some of which had been rejected by the precinct officials. There were 436 such ballots, 10 of which had been rejected by local officials. The subcommittee ruled that all 436 ballots were valid, despite Indiana court opinions which had invalidated ballots (nonabsentee paper ballots) marked with ink or lead pencil. With respect to absentee ballots either marked and then retraced with red lead pencil, or marked with black lead pencil but having one line of the "X" retraced and crossing two parallel lines at least one-sixteenth of an inch apart, the subcommittees disregarded state court opinions which had ruled such ballots invalid. The subcommittee cited instances [Goodich v Bullock (2 Hinds' Precedents § 1038) and Kearby v Abbott (2 Hinds' Precedents § 1076)] in which the House had held that state statutory requirements that ballots be marked with designated instruments were directory and not mandatory, particularly where the proper instrument was not available to the voter. [See also Denny, Jr. v Owens (2 Hinds' Precedents § 1088).] Further, the subcommittee ruled that where state law does not declare ballots void when an improper instrument is used, as was the case under Indiana "Rules for Counting Votes," which were silent on the matter, the law designating use of certain instruments was merely directory.

In adopting as valid the distinction between mandatory and directory provisions of state law pertaining to elections, the subcommittee cited the Nebraska case of *Waggonner* v *Russell,* 34 Neb. 116, 51 N.W. 465 (1892), which had incorporated language from Paines' treatise on elections as follows:

> In general, those statutory provisions which fix the day and the place of the election and the qualifications of the voters are substantial and mandatory, while those which relate to the mode of procedure in the election, and to the record and the return of the results, are formal and directory. Statutory provisions relating to elections are not rendered mandatory, as to the people, by the circumstance that the officers of the election are subjected to criminal liability for their violation.

Adoption by the subcommittee of the motion referred to above also had the effect of validating all regular ballots and absentee ballots not properly initialed on the back by the precinct clerks. Absentee ballots were accepted where the county clerk's initials

or signature appeared on the back so long as there also appeared on the back the seal of the county clerk. Thus, 2,492 ballots considered questionable were validated under this rule, though 562 of those ballots were reconsidered under other questionable categories. In resolving that the initialing requirements of state law were directory rather than mandatory, provided that the clerk's seal was affixed and his initials were upon absentee ballots, the subcommittee obviated state law requiring that two precinct clerks initial in ink the backs of non-absentee ballots in the lower left corner and that the voter fold the ballot to expose the initials, and stating that ballots not bearing clerk's initials were void. The subcommittee agreed with an Indiana Supreme Court opinion which had held that a precinct clerk's initials need not be in ink. The subcommittee, however, overruled state court decisions that ballots which did bear two sets of initials were void. The subcommittee did accept state law that the clerk's seal was mandatory on the absent voter's ballot, as well as state court opinions that absentee ballots were valid without the initials of the precinct or poll clerks, but with the initials (not necessarily the signature) of the county clerk. The subcommittee then considered precedents of the House, citing Moss v Rhea (2 Hinds' Precedents § 1120) for the proposition that "the failure of the clerks to initial the ballots was a mistake of which the voter himself was not a participant and the ballots should be counted." Citing McCrary, *A Treatise on the Law of Elections* (1897 ed., 522, 523) the committee report affirmed the proposition that the "acts of election officials are merely directory and the voter will not be disfranchised for failure of these officials to perform their duty."

The committee report then distinguished two House election contests [Steward v Childs (2 Hinds' Precedents § 1056) and Belknap v Richardson (2 Hinds' Precedents § 1042)] in which the Committee on House Elections in its report had rejected ballots which did not bear initials of precinct clerks as required by state law, but upon which reports the House did not act. The committee report then cited the contest of Taylor v England (6 Cannon's Precedents § 177) in which case the Committee on House Elections had unanimously agreed that:

> The House of Representatives should not consider itself obligated to follow the drastic statute of the State of West Virginia, under the provisions of which

all ballots not personally signed by the clerks of election in strict compliance with the manner prescribed had been rejected, but should retain the discretionary right to follow the rule of endeavoring to discover the clear intention of the voter.

As part of the motion described above, the Subcommittee on Elections had agreed to accept as valid those ballots so marked as to indicate the clear intention of the voter, provided that the ballots did not bear any distinguishing mark, that is, a mark which would enable a person to single out and separate the particular ballot from others cast, thereby evading the law insuring the secrecy of the ballot. The committee report cited the provisions of state law which governed the form of county ballots to be used and the way they were to be marked, as well as the statutory rules for counting votes, as interpreted by the Indiana Supreme Court. The subcommittee found that there had been no uniform application of the counting rules by precinct officials. The subcommittee also found that there was no provision of state law authorizing a state recount for a legislative offlce. Consequently, by the adoption of its ground rules, the Subcommittee on Elections took the following initial action before ruling on the counting of ballots marked apparently not in strict conformity with what the subcommittee deemed very narrow court interpretations of very strict statutory rules for marking of a ballot:

*Resolved,* That the Subcommittee on Elections hereby agrees that it will accept the precedents of the House of Representatives as binding in reaching its decision to the extent that the power to examine ballots and to correct both deliberate and inadvertent mistakes be vested in the subcommittee, the decisions of the Indiana courts being not necessarily conclusive but guiding and controlling only when such decisions commend themselves to the subcommittee's consideration.

The committee report posed as the central issue to be decided, the question of whether the "House will necessarily follow state court decisions in ruling on validity of questionable ballots, particularly when those decisions seem to be contrary to the intention of the voter in honestly trying to indicate a choice between candidates." The report then cited several "instances in which the House, through its Committee on Elections, has held that decisions of a state court are not binding on the House in the examination of ballots to correct deliberate or inadvertent mistakes and errors." [Brown v Hicks (6 Cannon's Precedents § 143) and Carney v Smith (6 Cannon's Precedents

§ 146).] The committee report then stated as follows:

> Although the House of Representatives generally follows State law and the rulings of State courts in resolving election contests, this is not necessarily so with respect to the validity of ballots where the intention of the voter is clear and there is no evidence of fraud.

The committee report then cited precedents of the House in which the Committee on House Elections (1) had declined to reject ballots because not marked strictly within the square as required by state law [Moss v Rhea (2 Hinds' Precedents § 1121), H. Rept. No. 1959, 57th Cong.]; (2) had gone behind the ballot to ascertain the intent of the voter by bringing in evidence of circumstances surrounding the election so as to explain ambiguities (not to contradict ballots) [Lee v Rainey (1 Hinds' Precedents § 641), H. Rept. No. 578, 44th Cong.]; (3) had held that "there being no doubt of the intent of the voter, the wrong spelling of a candidate's name does not vitiate the ballot" [Stroback v Herbert (2 Hinds' Precedents § 966), H. Rept. No. 1521, 47th Cong.]; and (4) where there was no ambiguity, had declined to go beyond the ballots to derive intention of voters [Wallace v McKinley (2 Hinds' Precedents § 987), H. Rept. No. 1548, 48th Cong.].

Having cited these precedents, the subcommittee proceeded to evaluate the various categories of questionable ballots to determine "whether the intent of the voter was clear from the markings on the ballots and whether the ballots were cast by properly registered voters."

With respect to sustaining the intention of the voter in judging many ballots irregularly marked, certain members of the subcommittee voted against validating many such ballots, contending that the motion adopted by the subcommittee regarding intention of the voter was being too liberally construed by the subcommittee, in contradiction to precedents which had voided similar ballots. Mr. John Lesinski, Jr., of Michigan, "felt that the intention of the voter was not sufficiently clear . . . where the party was marked and the voter also marked the square for individual candidates for other offices in the same party column but did not mark the square opposite the congressional candidate."

The subcommittee evaluated the validity of 85 absentee servicemen's ballots, or ballots of dependents of servicemen, which had been rejected, 28 of them having been marked "not registered" by local election officials. In 1953 the

Indiana legislature had adopted a general absentee registration law which made it mandatory for the clerk of the circuit court or the board of registration of a county to register without further application any member of the armed forces upon application, properly executed, for an absentee ballot. In 1957 the legislature attempted to repeal that provision making a member of the armed forces application for an absentee ballot sufficient to constitute registration.

The committee elicited and accepted as binding opinions from the bipartisan state election board, all of which construed the above statute to require that if such an application be received by the county clerk, that an application for registration shall be sent to the serviceman so applying and that an absentee ballot sent to a serviceman not registered as provided by law could not be counted because there was no automatic system of registration under state law.

The subcommittee found that 918 more ballots had been voted than the total number of persons who had signed voters' poll lists or whose names were written in as absentee voters. The subcommittee investigation disclosed no evidence of fraud, but numerous instances wherein precinct election officials had not required voters to sign poll lists, although affidavits of registration were marked to reflect that only eligible voters had voted. Thus the subcommittee validated all ballots cast by persons who had not signed poll lists, which were otherwise valid.

Following the election in November 1960, two candidates filed affidavits with the Special Campaign Expenditures Committee of the 86th Congress. Mr. Roush alleged that more absentee ballots had been recorded as cast than had been cast, and the special committee, upon conducting an investigation, reported that Mr. Chambers had been incorrectly credited with 11 too many absentee votes, and that Mr. Roush had incorrectly received four too many, a net loss of seven votes to Chambers. Mr. Chambers alleged that a tally sheet error in another precinct would add five votes to his total, and would thereby re-establish his overall majority at three votes. The special committee did not investigate Mr. Chambers' petition. This action by the Special Campaign Expenditures Committee prompted Mr. Glenard P. Lipscomb, of California, Mr. John B. Anderson, of Illinois, Mr. Charles E. Chamberlain, of Michigan, and Mr. Charles E. Goodell,

of New York, to file additional views to the final report of the Committee on House Administration in this contest. These minority members of the committee objected to the action taken by the House in the adoption of House Resolution 1, whereby the House had declared the seat from the Fifth Congressional District of Indiana vacant pending final report of the committee. These members in their additional views cited the *House Rules and Manual,* § 236 as follows:

> [B]ut the House admits on his prima facie showing and without regard to final right a Member-elect from a recognized constituency whose credentials are in due form and whose qualifications are unquestioned (1 Hinds' Precedents §§ 528–534).

These members claimed that a document circulated by the Clerk of the House, containing a compilation purporting to certify that Mr. Roush had been elected by two votes, but which had taken cognizance only of the claims made by the Special Committee on Campaign Expenditures, was partially instrumental in denying Mr. Chambers the prima facie right to his seat.

In its investigation of the question of the final right to the congressional seat from the Fifth Congressional District of Indiana, the Subcommittee on Elections considered both petitions filed by the candidates with the Special Committee on Campaign Expenditures of the 86th Congress, though that special committee had only investigated Mr. Roush's petition. The subcommittee found that Mr. Chambers had not been denied five votes due to failure to count five tally marks in unnumbered blanks. The subcommittee ruled that only one of the two tally sheets from the precinct in question showed these five tally marks, but that this tally sheet had not been filed with the precinct material, and that "the congressional ballots counted by the auditors for the entire precinct total agreed with the total vote for both congressional candidates as shown on the precinct certification." The subcommittee investigation confirmed the report of the special committee with respect to the petition filed by Mr. Roush, which claimed that 15 more absentee ballots had been recorded as cast than had been cast. The subcommittee therefore ruled that in Jefferson Precinct No. 1, Mr. Chambers had suffered a net loss of seven votes.

The subcommittee found that in Precinct No. 4 of Madison County, 42 absentee ballots had been illegally procured and cast, though there was no proof as to the per-

son for whom they were cast. The subcommittee applied the "general rule followed in the House for deduction of illegal votes where it is impossible to determine for which candidate they were counted."

Thus the subcommittee first determined the total votes cast for each candidate in the precinct (615 for Mr. Roush and 352 for Mr. Chambers), then determined the number of absentee votes counted for each candidate in the precinct (20 for Mr. Roush and 42 for Mr. Chambers), a total of 62 absentee ballots counted, 68 percent of which were cast for Mr. Chambers and 32 percent for Mr. Roush. Applying these percentages to the 42 votes to be deducted, the subcommittee deducted 29 votes from Mr. Chambers' total and 13 votes from Mr. Roush's total. The committee report then proceeded to cite precedents of the House in which the proportionate deduction method had been followed [for example, Oliver v Hale, H. Rept. No. 2482, 85th Cong.; Macy v Greenwood, H. Rept. No. 1599, 82d Cong.; Finley v Walls (2 Hinds' Precedents § 903); Platt v Goode (2 Hinds' Precedents § 923); Finley v Bisbee (2 Hinds' Precedents § 934); Wickersham v Sulzer and Grigsby (6 Cannon's Precedents § 113); Chandler v Bloom (6 Cannon's Precedents § 160); Bailey v Walters (6 Cannon's Precedents § 166); and Paul v Harrison (6 Cannon's Precedents § 158)].

The subcommittee took special precautions to insure the integrity of the questionable ballots by adopting a motion requiring the separation and sealing of all ballots ruled valid or invalid, without having been counted, and then requiring all previously sealed ballots to be opened and the final results of the election determined by two teams composed of a subcommittee member and a staff auditor. The count of the 6,072 questionable ballots was then rechecked by the audit staff, and no differences were noted. Thus the recount conducted by the Subcommittee on Elections showed Mr. Roush to have received a majority of 99 votes.

The additional views cited above expressed concern over what appeared to be inconsistent positions taken by the subcommittee, which had validated nonabsentee ballots in disregard of previous decisions of local precinct boards, but which had invalidated absentee ballots by adopting a policy of accepting the decisions of the local authorities, particularly with respect to servicemen's ballots, rather than "persisting in its liberal interpretation

of the law when the servicemen's ballots were before us." The members signing the additional views also expressed a hope that future contests would be decided according to statutes governing contested election cases, at a greatly reduced cost. These members advocated new federal legislation.

Robert T. Ashmore, of South Carolina, Chairman of the Subcommittee on Elections, submitted the unanimous report from the Committee on House Administration, which report had been unanimously recommended by the subcommittee, on June 13, 1961. This report (H. Rept. No. 513) accompanied House Resolution 339,[17] which was referred to the House Calendar and ordered printed as follows:

> Whereas the Committee on House Administration has concluded its investigation, including a recount of the ballots cast at the election of November 8, 1960, in the Fifth Congressional District of Indiana, pursuant to House Resolution 1; and
>
> Whereas such investigation and recount reveals that J. Edward Roush received a majority of the votes cast in said district for Representative in Congress: Therefore, be it
>
> *Resolved,* That J. Edward Roush was duly elected as a Representative to the Eighty-seventh Congress from the Fifth Congressional District of Indiana, and is entitled to a seat therein.

**17.** 107 CONG. REC. 10186, 87th Cong. 1st Sess.

On June 14, 1961, preceding debate in the House on the above resolution, John W. McCormack, of Massachusetts, the Majority Leader, requested:

> Mr. Speaker, in connection with the debate on the Roush-Chambers election matter today, I ask unanimous consent that general debate may continue for not longer than two hours; in other words, to provide an additional hour of general debate. That time, under my unanimous-consent request, is to be equally divided between the chairman of the subcommittee and the ranking minority member, the gentleman from Ohio [Mr. Schenck]; also, that upon the termination of debate, the previous question shall be considered as ordered.

During the debate which ensued, Mr. Ashmore, the subcommittee chairman, emphasized that "the intention of the voter was usually the controlling factor in passing upon these questionable ballots by your committee." He then pointed to the practice adopted by the subcommittee of separating and sealing ballots by category, and then examined and either validated or invalidated by the subcommittee by groups, without the subcommittee knowing for whom they had been cast.

Mr. Paul F. Schenck, of Ohio, the ranking minority member of the full committee, questioned "the possible overlap of jurisdiction of a special committee ap-

pointed each two years for the purpose of studying campaign expenditures . . . that the special committee in this past 86th Congress went too far and went beyond its proper jurisdiction in the actions recommended by its chairman on January 3 of this year."

Mr. Charles A. Halleck, Mr. E. Ross Adair, Mr. Richard L. Roudebush, Mr. William G. Bray, Mr. Earl Wilson, Mr. Ralph Harvey, and Mr. Donald C. Bruce, Members of the 87th Congress from Indiana, all joined with Mr. William C. Cramer, of Florida, ranking minority member of the Special Committee on Campaign Expenditures of the 86th Congress, to (1) dispute the initial need for a recount contrary to the three certifications of the Indiana secretary of state that Mr. Chambers had been duly elected, which fact was not understood by many majority members who were led to believe by the document circulated by the Clerk that both candidates had been certified; (2) to protest the action by the House in declaring the seat vacant with out permitting debate; and (3) to dispute the uniform "ground rules" adopted by the subcommittee, which did not follow the laws of the State of Indiana, to determine the validity of questionable ballots. They contended that the fact that local officials had not uniformly applied state election laws was no reason for the subcommittee to prescribe new rules, but rather that the subcommittee should better have uniformly applied State law.

In response to (3) above, Mr. Ashmore stated that the Committee on House Elections has always been reluctant to refuse to follow state elections laws, but that, under the Constitution which makes each House the final judge of the elections and returns of its members, the House is free to regard state law when it so desires.

Mr. McCormack argued that the House was fully justified in declaring the seat vacant, as the certificates of election, being merely prima facie evidence of election, had been sufficiently contradicted by certificates of error filed by county clerks and by the facts found by the Special Committee to Investigate Campaign Expenditures.

All time having expired for general debate on the resolution, the resolution was agreed to by a division vote demanded by Mr. Wilson, of Indiana, of 138 yeas to 51 nays. Mr. Roush was thereby declared entitled to the seat from the Fifth Congressional District of Indiana, and immediately ap-

peared at the bar of the House and took the oath of office.

On June 13, 1961, Mr. Ashmore had also submitted the unanimous committee report (H. Rept. No. 514) to accompany House Resolution 540,[18] which provided:

> *Resolved,* That the House of Representatives having considered the question of the right of J. Edward Roush or George O. Chambers, from the Fifth Congressional District of Indiana, to a seat in the House in the Eighty-seventh Congress, House Resolution 1, Eighty-seventh Congress, and having decided that the said J. Edward Roush is entitled to a seat in the House in such Congress with the result that the said J. Edward Roush is entitled to receive and will be paid the compensation, mileage, allowances, and other emoluments of a Member of the House from and after January 3, 1961, there shall be paid out of the contingent fund of the House such amounts as are necessary to carry out the provisions of this resolution in connection with such decision of the House, as follows:
>
> (1) The said George O. Chambers shall be paid an amount equal to compensation at the rate provided by law for Members of the House for the period beginning January 3, 1961, and ending on the date of such decision of the House.
>
> (2) The said J. Edward Roush and the said George O. Chambers each shall be paid an amount equal to the mileage at the rate of 10 cents per mile, on the same basis as now provided by law for Members of the House, for each round-trip between his home in the Fifth Congressional District of Indiana and Washington, District of Columbia, in response to the request of the Committee on House Administration for his appearance between the committee in connection with the investigation authorized by House Resolution 1, Eighty-seventh Congress.
>
> (3) The said J. Edward Roush and the said George O. Chambers each shall be reimbursed for those expenses actually incurred by him in connection with the investigation by the Committee on House Administration authorized by House Resolution 1. Eighty-seventh Congress, in accordance with that part of the first section of the Act of March 3, 1879 (20 stat. 400; 2 USC 226), which provides for payment of expenses in election contests.

The resolution was agreed to without debate and by voice vote. The committee report reasoned that "had the investigation . . . been an actual 'election contest,' both the contestant and contestee would have been authorized to [claim] reimbursement of those expenses actually incurred in connection with the investigation conducted by the committee."

*Note:* Syllabi for Roush or Chambers may be found herein at § 9.3 (certificates of election); § 10.6 (distinction between mandatory and directory laws); § 17.2 (alternatives to election contests);

**18.** *Id.* at p. 10391.

§ 37.3 (method of proportionate deduction); § 37.18 (marking ballot with improper instrument); § 38.4 (state law as an aid in interpreting voter intention); § 41.5 (use of auditors); § 45.4 (payments to candidates involved in alternatives to statutory election contests); § 45.5 (retroactive payments).

## § 60. Eighty-eighth Congress, 1963–64

### § 60.1 Odegard v Olson

On Feb. 7, 1963, the Speaker laid before the House a communication from the Clerk of the House, which contained contestant's notice of intention to contest the election held Nov. 6, 1962, in the Sixth Congressional District of Minnesota, contestee's answer thereto, and contestee's subsequent motion to dismiss the contest, with supporting brief. The Clerk's letter was read, and, together with the accompanying papers, referred on Feb. 7, to the Committee on House Administration and ordered printed as a House document.[19]

In his notice of contest, contestant alleged general irregularities on the part of election clerks and judges with respect to the counting of ballots, and requested the House to order a recount. Contestant had received 76,962 votes to 77,310 votes for contestee, a margin of only 348 votes. Contestee in his answer included a motion to dismiss the contest for failure of contestant to specify particular grounds in his notice of contest, thereby depriving the House of jurisdiction under 2 USC § 201, which requires contestant to "specify particularly the grounds upon which he relied in the contest." Contestee claimed that contestant had further attempted to "cloud his valid election" by obtaining a restraining order from the state supreme court, which, after a court hearing, had been vacated, thereby permitting the secretary of state to issue to contestee his certificate of election. Contestee further requested the House to require contestant to submit a bill of particulars setting out specific precincts and specific instances of error, irregularity, and failure to conform to law.

In his subsequent motion to dismiss the contest, contestee claimed that the 40-day period for gathering evidence by contestant had expired and that no evidence had been obtained and forwarded to the Clerk as provided by 2 USC §§ 203, 223, and therefore that no contest existed. In his supporting

**19.** H. Doc. No. 62.

brief, contestee referred to evidence submitted by contestant to the Special Committee to Investigate Campaign Expenditures of the 87th Congress and printed as House Report No. 2570 of the 87th Congress, and referred to the Committee on House Administration of the 88th Congress without recommendation. Contestee claimed this was not proper evidence to be considered by the Committee on House Administration, as it had not been served on contestee or his counsel, and was in the form of unsworn allegations.

The Subcommittee on Elections held public hearings on Feb. 26, 1963, at which both parties and counsel were present. The central issue was the ordering of a recount, or of an investigation to justify a recount, by the committee. The Subcommittee on Elections found that contestant "had abandoned the statutory procedure which established a specified time within which to develop evidence. . . . [B]y majority vote, the subcommittee concluded that the petition submitted by Mr. Olson be sustained on the grounds that the contestant failed to comply with the statutes in that he did not take testimony as provided by law and that the time limit for taking such testimony has now expired." The subcommittee thereby affirmed the ruling in Gorman v Buckley (6 Cannon's Precedents § 162), in which the Committee on House Elections adopted contestee's motion to strike contestant's deposition from the record on the grounds that the testimony was not supplied to the House in time, and then dismissed the contest as not being a case that could be legally considered by the committee.

Four minority members of the Subcommittee on Elections filed additional views to accompany the subcommittee report to the full committee. Mr. Charles E. Chamberlain, of Michigan, Mr. Charles E. Goodell, of New York, Mr. Willard S. Curtin, of Pennsylvania, and Mr. Samuel L. Devine, of Ohio, agreed with the contestant that the subcommittee should follow the precedent set by the Subcommittee on Elections in the 85th Congress. In that instance, following the special election of Feb. 18, 1958, of Mr. Albert Quie by 602 votes over Mr. Eugene P. Foley, the defeated candidate wired the Subcommittee on Elections of the House Administration Committee requesting an examination and recount of the ballots. In their additional views, the minority members pointed out that:

> The basis for this request was given as the closeness of the vote and allega-

tion that an unofficial and partial examination revealed several errors which were indicative that clerical errors and omissions had been made which, if corrected, could change the result of the election. In response the Elections Subcommittee sent a group comprised of three members and counsel to Minnesota on February 27, 1958, for the purpose of conducting a spot check of ballots in various precincts in the counties of the district.

This action was taken in the absence of a formal election contest. . . . It was taken on the basis of a telegram from the defeated candidate citing the closeness of the vote and alleging clerical errors. . . .

. . . The minority members of the committee are unanimous in their opinion that if a spot check of ballots was justified in the 1958 Foley v. Quie case, with a margin of 602 ballots out of 87,950, based upon the telegraphic request of the defeated Democratic candidate, then a spot check of ballots in the current case where the difference is less, 348 ballots out of 154,272, is more than justified.

These members in their additional views also pointed to the "confusion which may be created during the period surrounding a general election by the existence of two separate committees of the House having parallel and overlapping jurisdiction."

The report of the Subcommittee on Elections was printed for use by the full Committee on House Administration. The report was adopted by the full committee on Nov. 20, 1963, but was not submitted to the House. Neither was any resolution dismissing the contest or declaring contestee entitled to his seat reported to the House from the Committee on House Administration.

*Note:* Syllabi for Odegard v Olson may be found herein at § 5.2 (overlapping jurisdiction of committees); § 25.5 (failure to produce evidence); § 43.14 (failure of committee to submit report).

## § 61. Eighty-ninth Congress, 1965–66

### § 61.1 Frankenberry v Ottinger

On the organization of the House of Representatives of the 89th Congress on Jan. 4, 1965, Mr. James C. Cleveland, of New Hampshire, objected to the oath being administered to the Member-elect, Richard L. Ottinger, from the 25th Congressional District of New York, who was then asked by the Chair not to rise while other Members-elect and the Resident Commissioner-elect were sworn. Carl Albert, of Oklahoma, the Majority Leader, thereupon offered the following resolution (H. Res. 2):[20]

*Resolved,* That the Speaker is hereby authorized and directed to administer

**20.** 111 CONG. REC. 20, 89th Cong. 1st Sess.

the oath of office to the gentleman from New York, Mr. Richard L. Ottinger.

The rules of the 89th Congress not having been adopted, Mr. Albert was recognized for debate on his resolution under general parliamentary rules. Mr. Albert yielded to Mr. Cleveland for a parliamentary inquiry as to whether it would be in order for Mr. Cleveland to offer a substitute resolution or an amendment, particularly should the previous question be ordered. The Speaker replied that Mr. Albert controlled all time and would have to yield for that purpose, which Mr. Albert refused to do. Mr. Albert then refused to yield for further parliamentary inquiries and moved the previous question, which was ordered by voice vote. The resolution was then agreed to by voice vote. Mr. Ottinger thereupon appeared at the bar of the House and took the oath of office.

On Jan. 4, 1965, Mr. Cleveland explained the reasons for his objection to Mr. Ottinger being administered the oath of office; in an extension of remarks in the *Congressional Record*,[1] Mr. Cleveland alleged that at least $187,000 had been spent in the Ottinger campaign, of which $167,000 had been contributed by the Member's family, in violation of 18 USC § 608, which limits to $5,000 the amount any one person may contribute either directly or indirectly to any candidate for federal office. Mr. Cleveland also stated that Mr. Ottinger established at least 34 committees, and that two members of his family made $3,000 contributions to each of 22 committees, in order to avoid gift tax payments and to avoid making the contributions directly to the candidate.

On Jan. 18, 1965, Mr. Albert informed the House that on the following day he would call up a privileged resolution to dismiss the Frankenberry v Ottinger contest, which had been initiated by notice of contest delivered by contestant on Dec. 19, 1964, as required by 2 USC § 201. Mr. Albert obtained unanimous consent to insert in the *Congressional Record* a letter from H. Newlin Megill, assistant clerk of the House, addressed to the Speaker and advising him that persons permitted to bring contests under 2 USC §§ 201–226 "should be a party to the election and have the expectation that as a 'contestant' he would be able to establish 'his right to the seat'." The full text of the letter was as follows:

*January 14, 1965.*

The Honorable the SPEAKER,
*House of Representatives.*

DEAR MR. SPEAKER: Following the suggestion made by you in our tele-

1. *Id.* at pp. 41–45.

phone conversation, just prior to the convening of this session of the Congress, I received the Honorable Richard L. Ottinger, and discussed with him the matter of the attempt by James R. Frankenberry to challenge his right to a seat in the 89th Congress, under the provisions of Revised Statutes 105–130, as amended (2 U.S.C. 201–226).

An examination of the questions raised by Representative Ottinger and his counsel led me to the following conclusions which were conveyed to him orally, together with the copy of a draft of a resolution, which you may possibly hold to be privileged, for action by the House:

1. James R. Frankenberry is not a competent person to bring such action under this statute.

2. The said James R. Frankenberry was not a party to the election held November 3, 1964, in the 25th Congressional District of the State of New York, at which the Honorable Richard L. Ottinger was elected. It would appear that Frankenberry is merely the campaign manager of former Representative Robert R. Barry, who was, in fact, the defeated candidate in this district. (See records of the secretary of state, State of New York, and the Clerk of the U.S. House of Representatives.)

3. A reading of the fact of the statute which has been provided by the House of Representatives as "a good and sufficient rule to be followed and not to be departed from except for cause" merely leads to the conclusion that a person availing himself of the provisions of this act should be a party to the election and have the expectation that as a "contestant" he would be able to establish "his right to the seat." Among the clear expressions in this act, as amended, there appears this language, "No contestee and contestant for a seat in the House of Representatives. . . ." (2 U.S.C. 226.)

4. An examination of the various digests of all contest election cases in the House of Representatives fails to show that a single person has been permitted to use the statute in the manner proposed by Mr. Frankenberry in the matter at point.

5. The House of Representatives has decided that such an attempted action is not proper and that such a person is not competent to avail himself of the provisions of this act. (See H. Res. 54, agreed to January 10, 1941, *In re Locke Miller* v. *Michael J. Kirwan*, 19th Congressional District of Ohio.)

The House of Representatives may adjudicate the questions of the right to a seat in either of the following cases:

First. In the case of a contest between the "contestant" and the "returned member" of the House instituted in accordance with the provisions of the act of 1851, as amended.

Second. In the case of a "protest" or "memorial" filed by an elector of the district concerned.

Third. In the case of the "protest" or "memorial" filed by any other person.

Fourth. On motion of a Member of the House.

Every avenue of approach, cited above, is available to Mr. Frankenberry in his attempt to question the right of the Member to a seat, but the first case.

For the reasons heretofore cited, supported by other actions of the House in

such matters, I have supplied a draft of the following language for the possible consideration, and such action as the House in its wisdom may take:

"Whereas James R. Frankenberry, a resident of the city of Bronxville, N.Y., in the Twenty-fifth Congressional District thereof, has served notice of contest upon Richard L. Ottinger, the returned Member of the House from said district, of his purpose to contest the election of said Richard L. Ottinger; and

"Whereas it does not appear that said James R. Frankenberry was a candidate for election to the House of Representatives from the Twenty-fifth Congressional District of the State of New York, at the election held November 3, 1964; nor was he a candidate for the nomination from said district at the primary election held in said district, at which Richard L. Ottinger was chosen the Democratic nominee: Therefore be it

"*Resolved*, That the House of Representatives does not regard the said James R. Frankenberry as a person competent to bring a contest for a seat in the House and his notice of contest, served upon the sitting Member, Richard L. Ottinger, is hereby dismissed; and no petition or other paper relating to the subject matter contained in this resolution shall be received by the House, or entertained in any way whatever."

It would appear that the House should desire to take this action since:

(a) Mr. Frankenberry is attempting to misuse the statute provided by the House of Representatives.

(b) The House of Representatives has the responsibility of relieving the sitting Member from the burden of defending himself in this improper action, under the cumbersome statute, for a period of more than 10 months, so that he may participate fully in his constitutional duties of representing his congressional district.

(c) The courts held that questions as to the application of the statute are justifiable by the House and by the House alone. (See *In re Voorhis* (S.D. N.Y. 1923), 291 F. 673).

(d) Mr. Frankenberry has at least three other ways, which are proper, to proceed in this matter.

Such an action by the House of Representatives would put the question in proper perspective and preserve the rights of all parties.

Your interest prompted me to make this written report to you.

I am, Mr. Speaker,

Respectfully yours,

H. NEWLIN MEGILL.

On Jan. 19, 1965, Mr. Albert called up the following privileged resolution:[2]

Whereas James R. Frankenberry, a resident of the city of Bronxville, New York, in the Twenty-Fifth Congressional District thereof, has served notice of contest upon Richard L. Ottinger, the returned Member of the House from said district, of his purpose to contest the election of said Richard L. Ottinger; and

Whereas it does not appear that said James R. Frankenberry was a candidate for election to the House of Representatives from the Twenty-Fifth

**2.** 111 CONG. REC. 810, 811, 951, 89th Cong. 1st Sess. [H. Res. 126].

Congressional District of the State of New York, at the election held November 3, 1964; Therefore be it

*Resolved,* That the House of Representatives does not regard the said James R. Frankenberry as a person competent to bring a contest for a seat in the House and his notice of contest, served upon the sitting Member Richard L. Ottinger, is hereby dismissed.

Mr. Albert was recognized for one hour under the rules of the House, and he proceeded to cite the case of *In re Voorhis* (S.D.N.Y. 1923), 291 F 673, which held that the application of the statutes in question is justifiable by the House and by the House alone. Mr. Albert then cited the contest of Miller v Kirwan (77th Cong. 1st Sess.), in which the House had agreed to a resolution dismissing the contest, as contestant there had not been a proper party within the applicable statute because he could not, if he were successful, establish his right to a seat in the House. Contestant in that case had been candidate for the disputed office in the primary, but was not a candidate in the general election. In that case the resolution dismissing the contest had been called up on the floor for direct action by the House, without having been referred to or reported from the Committee on House Elections. Mr. Albert then stated that "there is no case on record that we have been able to find to the contrary, that a person not a party to an election contest is eligible to challenge an election under these statutes."

Mr. Charles E. Goodell, of New York, claimed that House Resolution 126 had been called up on that day (Jan. 16, 1965) in order to obviate the proceedings which had been instituted by contestant under 2 USC § 206 in the New York State Supreme Court for the taking of depositions and testimony on that date, which the contestee had not attended, in disregard of a court subpena. Claiming that there were many precedents of the House which denied a Member a seat due to excessive contributions and expenditures, Mr. Goodell asked that the matter be referred to the Committee on House Administration under the contested election statutes for full investigation.

Mr. Cleveland then cited the language of 2 USC § 201, as follows:

> Whenever any person intends to contest an election of any Member of the House of Representatives of the United States he shall—("It does not say a candidate only.")

Mr. Cleveland then cited the final report of the Special Committee to Investigate Campaign Expenditures of the 88th Congress (H. Rept. No. 1946) as "the policy

established by the House Committee on Administration":

> In order to avoid the useless expenditures of funds and the loss of time by the committee and the staff, it has been decided by the committee to conduct investigations of particular campaigns only upon receipt of a complaint in writing and under oath by *any person*, candidate, or political committee, containing sufficient and definite allegations of fact to establish a prima facie case requiring investigation by the committee. (Emphasis added.)

This statement represented the policy of the special committee, and not the construction of the statute by the Committee on House Administration. The special committee report was transmitted by its chairman to the Clerk of the House for the 89th Congress, with the request that it be referred by the House to the Committee on House Administration. The Clerk did not transmit this report to the House for referral.

Mr. Goodell proceeded to cite the 89th Congress investigation of the question of the final right of Dale Alford to his seat as "a precedent in which noncandidates have contested House seats, in which full investigations have been had by the House Committee on Administration." Mr. Eugene J. Keogh, of New York, questioned Mr. Goodell as to whether "that was an investigation that was under a special resolution of the House Committee on Administration and not under the general law regarding the matter of elections." Mr. Cleveland refused to yield for an answer, but proceeded to insert in the Record two briefs prepared by the American Law Division of the Library of Congress on the question of "whether a noncandidate must proceed under 2 USC § 201," in support of his opposition to the adoption of House Resolution 126.[3]

Mr. Cleveland then stated:

> [U]nder the contested election law the contestant bears the expense of the whole matter of taking depositions and gathering testimony. This is the reasoning behind it. That reasoning clearly specifies the fact that this law not only can be used by a noncontestant but it indeed must be used.

Mr. Albert replied that, if the House were to follow the recommendations of the gentleman from New Hampshire (Mr. Cleveland)—

> [W]e would be opening up to anybody or to any number of individuals, for valid or for spurious reasons, the right to proceed under these statutes, to contest the election of any Member of the House. These statutes place burdensome obligations on any contestee and should not be construed to open up the opportunity for just anyone to harass a Member of Congress or to impede the operations of the House.

**3.** *Id.* at pp. 953, 954.

Other remedies are available to the public generally and to Members of the House. Any individual or any group of individuals has a right to introduce a resolution at any time, calling for the investigation of any election. In the ordinary course of events, such a resolution would be referred to the Committee on House Administration, and thereafter to the Subcommittee on Elections, for investigation or hearings, as that committee or as the House might deem necessary under the circumstances.

If the contention of the gentleman is correct, there is no limit to the number of individuals who could contest any seat in this House, if the contest were brought in due time.

Mr. Albert then proceeded to cite other sections of 2 USC §§ 201–226, the statutes governing contested election cases, in order to show that Congress intended to limit the language "any person" in section 201 to a contestant for a seat in the House. He cited section 226 as follows:

No contestee or contestant for a seat in the House of Representatives shall be paid exceeding $2,000 for expenses in election contests.

Mr. Cleveland replied, in further opposition to the adoption of House Resolution 126, that:

[T]he intent of that is clearly that any reimbursement will be confined either to a seated or to a defeated Member. It simply limits the amount of reimbursement of expenses to these two classes. It does not govern the first section that specifically says any person can contest an election. . . .

The purpose of this law is to safeguard the people of the United States against a situation where the defeated candidate might not either have the heart or the will or the desire to contest an election which clearly should be contested for the common good and for the cause of good government.

Omar T. Burleson, Chairman of the Committee on House Administration and a Member from Texas, reminded the House that "he who seeks equity must do so with clean hands. This is a unilateral action. How could this House in its collective judgment determine whether or not equity is being done when the other party to the election is not a party to this attempt at contest?"

Mr. Albert moved the previous question, which was ordered by voice vote. Mr. Goodell demanded the yeas and nays on the resolution and the yeas and nays were ordered. By a vote of 245 yeas to 102 nays with 3 "present," the House agreed to House Resolution 126, thereby holding contestant not competent to bring a contest under 2 USC § 201, and dismissing the notice of contest served upon the sitting Member.

*Note:* Syllabi for Frankenberry v Ottinger may be found herein at § 19.2 (contestants as candidates in general election).

### § 61.2 Wheadon et al. v Abernethy et al.

On Sept. 17, 1965, Mr. Omar T. Burleson, of Texas, by direction of the Committee on House Administration, called up House Resolution 585,[4] dismissing the five Mississippi election contests arising from the November 1964, congressional elections. The cases were the election contests of Augusta Wheadon against Thomas G. Abernethy in the First Congressional District; Fannie Lou Hamer against Jamie L. Whitten in the Second; Mildred Cosey, Evelyn Nelson, and Allen Johnson against John Bell Williams in the Third; Annie DeVine against Prentiss Walker in the Fourth; and Victoria Jackson Gray against William M. Colmer in the Fifth Congressional District in the State of Mississippi.

The questions presented in these contests were considered simultaneously. The questions involved the failure of the contestants to avail themselves of the legal steps to challenge alleged discrimination among voters prior to the elections and to challenge the issuance of the certificates of election to the contestees after the elections were held. The denial of seats to Members-elect because of the alleged discriminatory practices involving disenfranchising groups of voters, and the standing of the contestants to proceed under the contested elections statute, were also at issue.

The contestees had been elected at the November 1964, general election. The contestants had been selected at an unofficial "election" held by persons in Mississippi from Oct. 30 through Nov. 2, 1964, in which, it was alleged, "all citizens qualified were permitted to vote." The latter "election" was held without any authority of law in the state. The contestants were all citizens, none of whom had been candidates in the November elections. They alleged that disenfranchisement of Negroes in Mississippi violated the Constitution and laws of the United States and that the House had the authority to consider the contests and unseat the contestees; that the House had a duty to guarantee that the election of its Members be in accordance with the requirements of the Constitution, and that where large numbers of Negroes had been excluded from the electoral process, where intimidation and violence had been utilized to further such exclusion, and where the free will of the voters had been prevented from being expressed, the House should

4. 111 CONG. REC. 24263, 89th Cong. 1st Sess.

unseat the contestee, vacate the elections and order new elections.

Hearings were held by the Subcommittee on Elections of the Committee on House Administration, on Sept. 13 and 14, 1965. The committee issued a report, House Report No. 1008, 89th Congress, first session, on Sept. 15, 1965.

The report noted that the contestees had been sworn in by vote of the House 276 to 149 on Jan. 4, 1965,[5] after they had been asked to step aside.[6] This established the prima facie right of each contestee to his seat.

The report noted that the contestants had not availed themselves of legal steps to challenge, in the courts, the alleged exclusion of Negroes from the ballot or the issuance of the certificates of election to the contestees.

It noted that the contestants had not been candidates at the election and thus, under House precedents, had no standing to invoke the House contested election statute.

It noted that there had been an election in Mississippi, in November 1964, for Members of the U.S. House of Representatives under statutes which had not been set aside by a court of competent jurisdiction; that, at the same election, Presidential electors and a U.S. Senator had been elected without question.

It noted, however, that a case challenging the Mississippi registration and voter laws was progressing through the United States courts and that the question of the constitutionality of the statutes was a proper one for the courts. The report noted also that the House was the judge of the elections of its Members and it was doubtful that any disenfranchisement, even if proven, would have actually affected the outcome of the November 1964, Mississippi congressional elections in any district.

The House, in following its rules and procedures should dismiss the cases, the report concluded, because the contestants did not qualify to utilize the House contested elections statute, and because the contestees had been elected under laws that had not been set aside at the time of the election.

The report did state, however, that in arriving at such conclusions, the committee did not condone disenfranchisement of voters in the 1964 or previous elections, nor was a precedent being established to the effect that the House

**5.** 111 CONG. REC. 19, 89th Cong. 1st Sess. [H. Res. 1].

**6.** *Id.* at p. 18.

would not take action, in the future, to vacate seats of sitting Members. It noted that the Federal Voting Rights Act of 1965 had been enacted in the interim and that if evidence of its violation were presented to the House in the future, appropriate action would be taken.

The report recommended dismissing the cases.

A minority view recommended consideration of the cases on their merits rather than on the grounds of status of the contestants, because, under the laws in the state in 1964, the claimants could not have become candidates to avail themselves of the contested elections act.

After extensive debate,[7] the House, by a vote of 228 to 143, agreed to House Resolution 585, which provided:[8]

> *Resolved*, That the election contests of Augusta Wheadon, contestant, against Thomas G. Abernethy, contestee, First Congressional District of the State of Mississippi; Fannie Lou Hamer, contestant, against Jamie L. Whitten, contestee, Second Congressional District of the State of Mississippi; Mildred Cosey, Evelyn Nelson, and Allen Johnson, contestants, against John Bell Williams, contestee, Third Congressional District of the State of Mississippi; Annie DeVine, contestant, against Prentiss Walker, contestee, Fourth Congressional District of the State of Mississippi; and Victoria Jackson Gray, contestant, against William M. Colmer, contestee, Fifth Congressional District of the State of Mississippi, be dismissed and that the said Thomas G. Abernethy, Jamie L. Whitten, John Bell Williams, Prentiss Walker, and William M. Colmer are entitled to their seats as Representatives of said districts and State.

An amendment was adopted striking out the phraseology entitling the contestees to their seats, as language inappropriate in a procedural matter.[9]

*Note:* Syllabi for Wheadon v Abernethy may be found herein at § 11.3 (racial discrimination as grounds for bringing contest); § 14.2 (invalid elections); § 19.3 (contestants as candidates in general election); § 35.1 (administration of oath as prima facie evidence of right to seat); § 44.1 (form of resolution disposing of contest).

### § 61.3 Peterson v Gross

On Oct. 11, 1965, Mr. Omar T. Burleson, of Texas, at the direction of the Committee on House Administration, called up a resolution (H. Res. 602)[10] dismissing

7. 111 CONG. REC. 24263–92, 89th Cong. 1st Sess.
8. *Id.* at p. 24263.
9. *Id.* at p. 24292.
10. 111 CONG. REC. 26499, 89th Cong. 1st Sess.

the election contest of Stephen M. Peterson against Harold R. Gross in the Third Congressional District in the State of Iowa. The committee report, House Report No. 1127, had been issued on Oct. 8, 1965, after hearings had been conducted on the case on Sept. 28, 1965.

The contestee was certified to have received 83,455 votes, and the contestant 83,036 votes at the Nov. 3, 1964, election. Contestee took the oath on Jan. 4, 1965, without objection and was sworn.[11] The contestant filed a notice of contest on Dec. 31, 1964, and requested a recount. The contestant alleged violations of the laws of Iowa, including burning of some ballots the day after the election, the casting of more ballots than there were names listed on the polls, the recording of absentee ballots in a back room by one person, and disappearance of a tally sheet.

The committee found that the proof presented did not sustain the charges brought and recommended dismissal of the contest.

The committee found that although there may have been human errors committed at the polls on election day, there was no evidence of fraud or willful misconduct. It found that the burned ballots were unused ballots and the practice of burning such ballots had been a uniform one for numerous years. The allegation of more ballots cast than names listed on the polls was discharged by the conclusion that some inadvertent errors had been made but the errors were insufficient to change the result even if all the excess ballots were added to the total of the contestant. The charge respecting the counting of absentee ballots was found to apply to one polling place and the circumstances were such as to make it inadequate as a charge.

The missing tally sheet was located and the disappearance found to be due to factors involving technical operation of a voting machine, not the counting of the results.

It was further disclosed that the request for a recount was in the nature of a "fishing expedition" and that the contestant knew of no fraud by which to substantiate it.

The committee acknowledged that Iowa had no recount statute applicable to a U.S. House election but held that the absence of such a statute had no effect on the jurisdiction of the committee; that the committee would proceed to a recount if some substantial allega-

**11.** *Id.* at p. 19.

tions of irregularity or fraud were alleged and if the likelihood existed that the result of the election would be different were it not for such irregularity or fraud.

Under the circumstances of the case, it declared, the evidence did not justify a recount since the contestant had not clearly presented proof sufficient to overcome the presumption that the returns of the returning officers were correct.

In the debate on Oct. 11, 1965, on House Resolution 602, Robert T. Ashmore, of South Carolina, Chairman of the Subcommittee on Elections of the Committee on House Administration, spoke in favor of adopting the resolution dismissing the contest. Mr. Ashmore observed that the contestee had been issued a certificate of election by the Governor of Iowa, administered the oath of office by the Speaker, and performed his duties as required under his oath of office, "So, as a result of these events, he has established a prima facie right to the office." Mr. Ashmore recounted some of the alleged errors recited by the contestant that the committee had found to be unsubstantiated, and stated:

> Moreover, Mr. Speaker, the evidence in this case shows that such errors were wholly insufficient to change the results of the election, even if the excess ballots about which we speak here in this particular instance should all be added to the total of the contestant. . . . In this case the committee is of the opinion that no alleged misconduct or error on the part of the election judges, nor a combination of all such errors by any and all officials in the entire Third Congressional District of the State of Iowa, would be sufficient to change the results of this election.[12]

Mr. Ashmore then cited the election case of Eggleston v Strader (2 Hinds' Precedents § 878) on the point.

Mr. Ashmore also pointed out that the evidence showed that no one protested any of the election proceedings during election day and there was "nobody who testified on election day that the results were anything but proper." Reminding the House that there is a presumption of regularity—that the election officials have done their duty and their returns are correct—Mr. Ashmore then stated:

> The burden of proof, my friends, let us not forget, rests upon the contestant. It is squarely on his shoulders to show sufficient grounds to justify a recount or to unseat a Member of this House. He must meet his obligation. It is not the committee's duty to prove his case for him. The contestant must prove not just irregularities—and not just violations of the Iowa election

**12.** *Id.* at p. 26499.

laws, but also that if such irregularities had not existed the results of the election would have been different.[13]

Mr. Willard S. Curtin, of Pennsylvania, also spoke in favor of the resolution, remarking that the contestant had sent a letter to many Members, in which letter the contestant admitted that he was not alleging fraud on the part of anyone. Mr. Curtin repeated that the committee investigation had revealed no substance to the contestant's allegations of error.

In opposition to the resolution, Mr. Frank Thompson, Jr., of New Jersey, argued that fraud was not necessarily a condition precedent for an election contest. The following colloquy took place:[14]

MR. THOMPSON of New Jersey: I do not mean to bicker with the distinguished chairman of the subcommittee. I just wanted to emphasize that in his remarks, as in the remarks of our colleague from Pennsylvania, there was some emphasis on the absence of fraud.

We acknowledged the absence of fraud, but in no circumstances should we establish as a condition precedent to a contest that there be fraud.

MR. ASHMORE: I mentioned that there was no fraud because of its absence, which I believe is worth noting—the fact that there was no fraud.

MR. THOMPSON of New Jersey: We will concede there was no fraud. Will the gentleman concede that it is not a condition precedent to an election contest for a House seat?

MR. ASHMORE: Absolutely it is not.

MR. THOMPSON of New Jersey: I thank the gentleman.

Thereafter, Mr. Thompson, Mr. Ashmore, and other Members lamented the absence of state procedures in Iowa for contesting elections and conducting recounts. After more discussion by Mr. Samuel L. Devine, of Ohio, in favor of the resolution, Mr. Neal Smith, of Iowa, made reference to the inequities involved in contested elections, and commented on the election case, the costs of proceeding under the committee rules and the composition of the committee:[15]

MR. SMITH of Iowa: Mr. Speaker, I have not been a direct participant in any way in this contest. I considered it to be a contest between Mr. Peterson and Mr. Gross. I am not a member of the committee. But, after all, I am from Iowa and so I have been interested in following the procedures very carefully in this case.

I would vote in any election contest to seat whoever I believe actually received the most votes. Unfortunately, we cannot vote on that basis on this resolution today because I do not and other members do not know who received the most votes in the Third Congressional District of Iowa in 1964. . . .

**13.** *Id.* at p. 26500.

**14.** *Id.* at p. 26501.

**15.** *Id.* at pp. 26502, 26503.

Because evidence was being hidden and the attitude of election officials in some counties indicated they would destroy more evidence, the contestant went to both the State and Federal courts. In each case the contestee claimed the courts did not have jurisdiction and the courts said the jurisdiction is in the House of Representatives except that the State supreme court did order the voting records held until the 89th Congress had a chance to convene and organize. I do not criticize those court opinions but they do completely undercut the claim of some that the committee should not assume full jurisdiction. . . .

When the 89th Congress convened and organized, and the contest had been filed, the chairman of the subcommittee [Mr. Ashmore] properly sent a telegram asking election officials to hold election material. Some of them used this telegram as an excuse not to permit inspection of it subsequently at a time when they could be put under oath and examined concerning it.

When election officials resist producing pertinent documents upon which they should be examined, it would take more time to go through court procedures for each official involved than is allowed under committee rules to complete discovery and anyway court opinions have indicated lack of jurisdiction for supervision. Under these procedures, it costs a contestant from $10,000 to $30,000 to run through the obstacle course. Few, if any Democratic candidates for Congress in Iowa have ever had $10,000 available to spend in a general election campaign, let alone a contest, and to force a contestant to raise that amount of money for a contest while the contestee is drawing his salary and furnished a staff and office is in and of itself a very unfair practice. . . .

In one county, absentee ballots were burned. The county election official naturally said they were unused ones and that he had done that before. The fact that someone has broken the law before does not make him immune thereafter. The only way anyone could know whether they substituted ballots and burned the ballots that were replaced would be for the committee to have a handwriting expert look at those ballots that were left.

With the adoption of this report, without pertinent records having been inspected, the officials who committed irregularities will be free to finish destroying evidence without anyone but those election officials knowing whether irregularities were committed for the purpose of stealing votes.

Following more discussion focusing on the contestant's failure to prove his case, Mr. Omar T. Burleson, of Texas, stated that members on the committee were chosen because they were lawyers and because of their experience and that objectivity was characteristic of the committee:

MR. BURLESON: Mr. Speaker, I am sure that the gentleman from Iowa did not intend to infer that by design the people of, we will say for the lack of a better word, conservative persuasion or from the South, have intentionally been assigned to the Subcommittee on Elections. As a matter of fact, the members of this subcommittee have been chosen because they are lawyers.

Or like myself—they were lawyers. I usually speak of myself in that respect in the past tense. But they were put on that committee for that reason. Also they were recognized according to seniority, a consideration which is always given in these things.

There has never been any attempt to stack the committee and I am sure the gentleman would not intentionally make that as an accusation, but I think he did infer it.

MR. SMITH of Iowa: I did not intend to reflect upon any one section of the country. I just want to say, if any one section of this country has every member on an election subcommittee, it gives a general image that is not good, no matter what section of the country they are from.

MR. BURLESON: It may appear that way but the subcommittee and the full committee in handling these matters, during the 19 years that I have served in this capacity, have always tried to be as judicial and as analytical and objective in these matters as it is possible to be and as our capacities permit us to be. I have never seen a partisanship angle which I thought overcame or prejudiced an objective decision in these matters.

The House, by voice vote, agreed to House Resolution 602 and a motion to reconsider was laid on the table.[6]

*Note:* Syllabi for Peterson v Gross may be found herein at § 5.4 (qualifications of Members on Subcommittee on Elections); § 13.3 (alleged error insufficient to change result); § 36.6 (official returns as presumptively correct); § 40.6 (burden of proving recount would change election result).

## § 62. Ninetieth Congress, 1967–68

### § 62.1 Lowe v. Thompson

The report (No. 365, submitted June 14,1967) of the committee on elections in the case of Lowe v Thompson showed that Fletcher Thompson, the Republican nominee, was elected to the office of Representative from the Fifth Congressional District of Georgia in the general election held on November 8, 1966. The only names on the ballot were those of Mr. Thompson and his Democratic opponent, Archie Lindsey. His credentials having been presented to the Clerk of the House, Mr. Thompson appeared, took the oath of office, and was seated on January 10, 1967.

The contest of Mr. Thompson's election was initiated by Mr. Wyman C. Lowe by service upon the then Member-elect on December 12, 1966, of a notice of contest pursuant to the Federal contested election law, Revised Statutes, title II, chapter 8, section 105; title 2, United States Code, section 201, claiming that contestee's

**16.** *Id.* at p. 26504.

election was null and void and that his seat should be declared vacant because the manner in which the Democratic candidate, Archie Lindsey, had been nominated was contrary to the Georgia Election Code. Contestant charged that the Fulton County Democratic Executive Committee, which had substituted Lindsey for the primary election winner, Charles L. Weltner, upon Weltner's withdrawal, was without lawful authority to make such substitution since the Georgia Election Code and the state Democratic Party rules authorized a county committee to fill a vacancy in a party nomination only when the vacancy occurred after the nomination had been made by the state Democratic Party convention. Contestant argued that if the vacancy arose prior to the convention, it had to be filled by special primary election. Mr. Weltner's withdrawal had preceded the convention. It was contestant's conclusion that the general election was voided by the defective nomination of the Democratic candidate.

The committee on elections concluded that Mr. Lowe had no standing to bring an election contest under the federal contested election law, because contestant was not a candidate in the general election. The committee noted that recent precedents involving contests brought against Members-elect by persons who were not candidates in the general election were to the effect that such persons lacked standing to bring such a contest.

The committee, however, agreed to consider the petition Mr. Lowe presented to the House of Representatives, praying for an investigation of the right of Representative Thompson to his seat. The committee noted the constitutional derivation of the power of the House to judge the election and qualifications of its Members, and stated that the House is not confined to deciding election contests brought under the statute:

> [The House] may adjudicate the question of the right to a seat in any of the following cases:
>
> (1) In the case of a contest between the contestee and the returned Member of the House instituted in accordance with the provisions of Law.
>
> (2) In the case of a protest or memorial filed by an elector of the district concerned.
>
> (3) In the case of the protest or memorial filed by any other person.
>
> (4) On motion of a Member of the House (Contested election case of Richard S. Whaley, 63d, Cong., Cannon's Precedents of the House of Representatives, vol. 6, sec. 78, p. 111.)

After considering Mr. Lowe's petition, however, the committee

concluded that the petition should be denied:

> The committee is unaware of any precedent for depriving a Member of his seat *solely on the basis of the irregularity of the nomination of his opponent* in the general election and, indeed, no such precedent is cited by petitioner either in his petition or in his brief filed in the contested election case. It should be borne in mind that this is not a case where fraud or irregularity in the *returned Member's nomination* is charged.

The committee report also stated:

> Nor is the committee inclined in this case to ignore the State court's ruling against petitioner who filed suit against Archie Lindsey and certain election officials seeking to enjoin Lindsey's candidacy and to require the call of a special Democratic primary election. According to petitioner, the grounds of his lawsuit were those asserted here. The suit was dismissed by the trial court on demurrer on November 1, 1966. Where, as here, petitioner's case is built on technicalities of State law and party rules respecting the method of nominating party candidates, there being no charge of fraud or corrupt practices on the part of the party officials or the party's nominee, the committee believes that disposition of the case by a State court should be left undisturbed.

Subsequently, Mr. Robert T. Ashmore, of South Carolina, by direction of the Committee on House Administration, called up the following resolution as privileged on July 11, 1967:

> *Resolved,* That the election contest of Wyman C. Lowe, contestant, against Fletcher Thompson, contestee, Fifth Congressional District of the State of Georgia, be dismissed, and that the petition (numbered 75) of Wyman C. Lowe relative to the general election on November 8, 1966, in the Fifth Congressional District of the State of Georgia be denied.

The reported privileged resolution, House Resolution 541, was agreed to by voice vote after debate.[7]

*Note:* Syllabi for Lowe v Thompson may be found herein at § 7.6 (adoption of state court's views); § 10.21 (illegal nominating procedure); and § 17.5 (investigation initiated by petition). See also § 19.1 (parties to contest).

### § 62.2 Mackay Blackburn

On July 11, 1967, Mr. Robert T. Ashmore, of South Carolina, at the direction of the Committee on House Administration, called up House Resolution 542,[18] which had been recommended by the committee in its report, House Report No. 366, on the contested election of James A. Mackay against Benjamin B. Blackburn in the Fourth Congressional District of the State of Georgia in the 90th

**17.** 113 CONG. REC. 18290, 18291, 90th Cong. 1st Sess., July 11, 1967.

**18.** 113 CONG. REC. 18291, 90th Cong. 1st Sess.

Congress. At the swearing in of Members-elect to the 90th Congress on Jan. 10, 1967, the contestee had been asked to step aside. The House then proceeded to adopt a resolution authorizing the oath to be administered to the contestee and providing that the question of the final right of the contestee to the seat be referred to the Committee on House Administration.[19]

The issue involved the counting of so-called "overvotes" on punch card voting machines during the November 1966 election. Contestant alleged that the computers that tallied the votes erroneously failed to count about 7,000 votes, and that the procedures for duplicating defective ballots were improper. Election officials, acting in accordance with what they construed to be Georgia law, had programed the computing machines that counted the ballots to reject those cards where a voter had punched a straight party ticket and then also punched out the scored block for the congressional candidate of the opposing party. While the contested election case was under consideration, a lawsuit was instituted in the Georgia courts concerning the interpretation of the Georgia statutes relating to the canvassing of punch card votes. The litigation was terminated on Mar. 30, 1967, by the Georgia Supreme Court's denial of a writ of certiorari to the Georgia Court of Appeals which, on Jan. 25, 1967, had held in favor of the interpretation by the election officials [*Blackburn* v *Hall* (1967), 115 Ga. App. 235, 154 S.E.2d 392].

On Apr. 13, 1967, contestant notified the House of the withdrawal of his notice of contest.

The Committee on House Administration issued a report on June 14, 1967 (H. Rept. No. 366), which provided that the contestee was the duly elected Representative from the Fourth Congressional District of Georgia and was entitled to his seat.

During debate, the fact was brought out that some difficulties had occurred in counting and handling the punch card ballots, and in the voters' use of them in the "automatic" voting machines. This was not, however, a crucial matter in the determination of the case. The contestee himself participated in the debate, although it was only to express gratitude to his colleagues for their consideration during the time of the election contest.

The House agreed on July 11, 1967, to House Resolution 542, which provided:[1]

**19.** 113 CONG. REC. 27, 90th Cong. let Sess. [H. Res. 2].

**1.** 113 CONG. REC. 18291, 90th Cong. 1st Sess.

*Resolved,* That Benjamin B. Blackburn was duly elected as Representative from the Fourth Congressional District of the State of Georgia to the Ninetieth Congress and is entitled to his seat.

A motion to reconsider was laid on the table.[2]

## § 63. Ninety-first Congress, 1969–70

### § 63.1 Lowe v Thompson

On Apr. 23, 1969, Mr. Watkins M. Abbitt, of Virginia, submitted the unanimous report of the Commmittee on House Administration (H. Rept. No. 91–157) on House Resolution 364, dismissing the contested election case of Wyman C. Lowe v Fletcher Thompson from the Fifth Congressional District of Georgia. Mr. Thompson, the Republican nominee, was re-elected to the office of Representative from the district in the general election held on Nov. 5, 1968. His Democratic opponent was Charles L. Weltner. The result of the election was officially certified in accordance with the laws of Georgia. His credentials having been presented to the Clerk of the House, Mr. Thompson appeared, took the oath of office, and was seated on Jan. 3, 1969.[3]

Regarding the election contest, the committee report states:

> The contest of Mr. Thompson's election was initiated by Mr. Lowe, an unsuccessful candidate in the Democratic primary, by service upon the Member on December 18, 1968, of a notice of contest pursuant to the Federal contested election law, Revised Statute, title I, chapter 8, section 105; title 2, United States Code, section 201, claiming that contestee's election was null and void and that his seat should be declared vacant. The ground of the contest asserted in the notice of contest are then that the general election was invalid because the Democratic candidate, Mr. Weltner, had not been lawfully nominated or that there are such grounds as to raise grave doubts that he had been lawfully nominated. Mr. Weltner won the nomination from Mr. Lowe, his only opponent, in the Democratic primary election on September 11, 1968. Contestant claims that Mr. Weltner's victory in the primary election was the result of certain specified "malconduct, fraud, and/or irregularity" on the part of poll officers in 40 of the 155 precincts of the Fifth District. There is no allegation of wrongful conduct on Mr. Weltner's part or any attribution to him of the alleged misconduct of the poll officers. Nor is it contended that contestee engaged in any wrongful conduct in the general election. The sole basis for attacking contestee's election is the alleged invalidity of his Democratic opponent's nomination.

In submitting the committee report, Mr. Abbitt made the following remarks,[4] which further summarize the election contest:

**2.** *Id.* at p. 18292.

**3.** 115 CONG. REC. 15, 91st Cong. 1st Sess.

**4.** 115 CONG. REC. 10040, 10041, 91st Cong. 1st Sess., Apr. 23, 1969.

MR. ABBITT: Mr. Speaker, only one election contest evolved from the 1968 general election and that was in the Fifth Congressional District of the State of Georgia. For the third time in recent years Wyman C. Lowe has initiated a contest.[5] In 1951 and again in 1967 the House dismissed contests brought by Mr. Lowe on the basis that he lacked standing to bring a contest under the contested-election statute. That is the basis for recommending dismissal of the current contest. In none of the contests was Mr. Lowe a candidate in the general election for the congressional seat.

Fletcher Thompson, the Republican nominee, was reelected to the office of Representative from the Fifth Congressional District of Georgia in the general election held on November 5, 1968. His Democratic opponent was Charles L. Weltner. The result of the election was officially certified in accordance with the laws of Georgia. His credentials having been presented to the Clerk of the House, Mr. Thompson appeared, took the oath of office, and was seated on January 3, 1969.

The contest of Mr. Thompson's election was initiated by Mr. Lowe, an unsuccessful candidate in the Democratic primary, by service upon the Member on December 18, 1968, of a notice of contest pursuant to the Federal contested election law claiming that the contestee's election was null and void and that his seat should be declared vacant. The grounds of the contest asserted in the notice of contest are that the general election was invalid because the Democratic candidate Mr. Weltner had not been lawfully nominated or that there are such grounds as to raise grave doubts that he had been lawfully nominated. Mr. Weltner won the nomination from Mr. Lowe, his only opponent, in the Democratic primary election on September 11, 1968. Contestant claims that Mr. Weltner's victory in the primary election was the result of certain specified "malconduct, fraud and/or irregularity" on the part of poll officers in 40 of the 155 precincts of the fifth district. There is no allegation of wrongful conduct on Mr. Weltner's part or any attribution to him of the alleged misconduct of the poll officers. Nor is it contended that contestee engaged in any wrongful conduct in the general election. The sole basis for attacking contestee's election is the alleged invalidity of his Democratic opponent's nomination.

The record before the committee reveals that contestant brought an action against Mr. Weltner in the superior court of Fulton County, Ga., to set aside his nomination under the Georgia Election Code. This suit was dismissed on September 20, 1968. On appeal to the Georgia Court of Appeals, the lower court's ruling was affirmed and a subsequent petition for certiorari filed with the Supreme Court of Georgia was denied.

The contest came before the Subcommittee on Elections on contestee's request that the notice of contest be dismissed for failure to state a cause of action. Having considered the oral arguments of the parties and the brief filed by contestant, the committee concludes that contestant has no standing to bring the contest and that the notice

**5.** See Lowe v Davis, 1948 (§ 54.1, supra); Lowe v Davis, 1951 (§ 56.3, supra); and Lowe v Thompson, 1967 (§ 62.1, supra).

of contest does not state grounds sufficient to change the result of the general election. Contestant, an unsuccessful candidate in the Democratic primary, was not a candidate for the Fifth Congressional District seat in the general election and does not claim any right to the seat. There are a number of recent precedents from 1941 to 1967 involving contests brought by persons who were not candidates in the general election indicating that the House of Representatives regards such persons as lacking standing to bring an election contest under the statute. [Citing Miller v Kirwan (§ 51, supra); McEvoy v Peterson (§ 52.2, supra); Woodward v O'Brien (§ 54.6, supra); Lowe v Davis (§ 56.3); Frankenberry v Ottinger (§ 61.1, supra); and Five Mississippi Cases of 1965 (§ 61.2, supra).]

The committee ultimately concluded:

The committee, after careful consideration of the notice of contest, the oral arguments, and the brief filed by contestant, concludes that contestant Wyman C. Lowe, not being a candidate in the general election, has no standing to bring a contest under the contested election law and that he has failed to state sufficient grounds to change the result of said election. It is recommended that House Resolution 364 be adopted dismissing the contested election case.

The House agreed to House Resolution 364,[6] which provided:[7]

*Resolved*, That the election contest of Wyman C. Lowe, contestant against Fletcher Thompson, contestee, Fifth Congressional District of the State of Georgia, be dismissed.

A motion to reconsider was laid on the table.

*Note:* Syllabi for Lowe v Thompson may be found herein at § 19.1 (contestants as candidates in general election).

## § 64. Ninety-second Congress, 1971–72

### § 64.1 Tunno v Veysey

On Nov. 9, 1971, Mr. Watkins W. Abbitt, of Virginia, from the Committee on House Administration, submitted the committee report, House Report No. 626, on the contested election case of David A. Tunno v Victor V. Veysey from the 38th Congressional District of California. Mr. Veysey was certified on Dec. 17, 1970, by the secretary of the State of California as elected to the office of U.S. Representative in Congress from the district at the general election held on Nov. 3, 1970. The credentials of Mr. Veysey were presented to the House of Representatives and he appeared, took the oath of office, and was seated without objection, on Jan. 21, 1971.[8]

**6.** 115 CONG. REC. 10041, 91st Cong. 1st Sess., Apr. 23, 1969.

**7.** *Id.* at p. 10040.

**8.** 117 CONG. REC. 13, 92d Cong. 1st Sess.

The official canvass of the district showed that a total number of 173,163 votes were cast in the congressional election in the district. Of this total number of votes cast, Mr. Veysey received 87,479 votes and Mr. Tunno, the contestant, received 85,684 votes. Mr. Veysey's majority consisted then of 1,795 votes.

The contestant served notice of contest on the contestee by mail on Dec. 14, 1970. At the same time a notice of intent to contest was filed by the contestant's representative with the Clerk of the House for delivery to the Committee on House Administration.

While the contestant claimed the seat as required by 2 USC §§ 382 and 383,[9] in his notice of contest, the relief sought by the contestant, as set forth in his notice, was that the seat be declared vacant. The notice stated:

> Contestant requests the House of Representatives of the United States, 92d Congress, first session, declare a vacancy in the office of Member of the House of Representatives, U.S., 38th Congressional District, State of California, and direct the proper executive authority of the State of California to issue a writ of election ordering a new election to fill said vacancy of said office of Member, House of Representatives of the United States, 38th Congressional District, State of California.

The contestant claimed that the affidavits of registration of some 11,137 voters in Riverside County, California, had been wrongfully and illegally canceled, depriving approximately 10,600 qualified voters of the right to vote. The notice stated:[10]

> 1. On or about August 15, 1970, the elections supervisor, Riverside County, State of California (hereinafter referred to as "supervisor") wrongfully and illegally canceled the affidavits of registration of approximately 11,137 voters of Riverside County, State of California. As a result of said illegal and wrongful cancellation of said affidavits of registration, approximately 10,616 qualified voters of Riverside County, State of California, were precluded from voting at said last preceding general election for Member of the U.S. House of Representatives from the 38th district.

From facts set out in the committee report, it appeared that local California election officials may have misinterpreted a state election statute, a mistake which may have disenfranchised approximately 10,600 voters. There were no facts indicating how many, if any, of these voters would have voted, had they not been disenfranchised, nor was

**9.** Pub. L. No. 91–138, §§ 3, 4; 83 Stat. 284 (Dec. 5, 1969). This was the first case arising under the Federal Contested Elections Act of 1969.

**10.** H. Rept. No. 92–626, submitted Nov. 9, 1971.

there any indication, of course, of how they would have voted. The report declared:

> On Tuesday, May 11, 1971, the Subcommittee on Elections met to hear arguments on the motion to dismiss the contest submitted by the contestee, Victor V. Veysey. Opening statements and rebuttal statements were given by the attorney for the contestant, Mr. Robert J. Timlin and the attorney for the contestee, James H. Kreiger. The contestant, Mr. David Tunno, and the contestee, Congressman Victor V. Veysey, also submitted statements.
>
> The new Federal Contested Election Act, Public Law 91–138, 83 Stat. 284, provides in section 4(b)(3) this defense to the contestee, "Failure of notice of contest to state grounds sufficient to change result of election." This defense was raised by the present contestee by way of a motion to dismiss. This provision was included in the new act because it has been the experience of Congress that exhaustive hearings and investigations have, in the past, been conducted only to find that if the contestant had been required at the outset to make proper allegations with sufficient supportive evidence that could most readily have been garnered at the time of the election such further investigation would have been unnecessary and unwarranted.
>
> Under the new law then the present contestant, and any future contestant, when challenged by motion to dismiss, must have presented, in the first instance, sufficient allegations and evidence to justify his claim to the seat in order to overcome the motion to dismiss.
>
> The major problem raised is, on the basis of the contestant's allegations and evidence, are a sufficient number of potential votes in actual contention to warrant the committee granting the relief sought and declaring the seat vacant and calling for a new election? This may be restated as, what standards has the House of Representatives applied in contests wherein declaring a vacancy was either contemplated or actually done where registration irregularities were alleged.
>
> With regard to the problem, the contested election case of Carney v. Smith [6 Cannon's Precedents 911 in the 63d Congress considered a request that the seat be declared vacant and in response to the request set forth the following standards as a criteria for taking such action.
>
> We do not believe that a committee of this House, looking for the truth to determine who in fact was elected by the voters, should, on account of this irregularity, disfranchise the electors of this township. No question is made but that the ballots cast in this precinct were cast by legal voters and in good faith. Nor is it claimed that the contestee received a single vote more than was intended to be cast for him, or that the contestant lost a single vote. We do not believe that the facts warrant the rejection of the entire poll of this township, nor does the law as practiced in almost every jurisdiction warrant such a result. *McCrary on Elections* [George McCrary, *A Treatise on the American Law of Elections*, Chicago, Callaghan & Co., 1897] section 488, says:
>
> > The power to reject an entire poll is certainly a dangerous power, and, though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested-election

case, it should be exercised only in an extreme case; that is to say, where it is impossible to ascertain with reasonable certainty the true vote.

*Paine's Treatise on the Law of Elections* [Halbert Paine, *A Treatise on the Law of Elections*, Boston, Little, Brown & Co., 1890] section 497, says:

> Ignorance, inadvertence, mistake, or even intentional wrong on the part of the local officers should not be permitted to disfranchise a district.

Section 498 says:

> The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result.
>
> The departure from the mode prescribed will not vitiate an election, if the irregularity does not deprive any legal voter of his vote, or admit an illegal vote, or cast uncertainty on the result and has not been occasioned by the agency of a party seeking to derive a benefit from them.
>
> Power to throw out the vote of an entire precinct should be exercised only under circumstances which demonstrate beyond a reasonable doubt that there has been such a disregard of law or such fraud that it is impossible to determine what votes were lawful or unlawful, or to arrive at any result whatever, or whether a great body of voters have been prevented from exercising their rights by violence or intimidation. (Case of *Daley* v. *Petroff*, 10 Philadelphia Rep., 289.)
>
> There is nothing which will justify the striking out of an entire division but an inability to decipher the returns or a showing that not a single legal vote was polled or that no election was legally held. (In *Chadwick* v. *Melvin, Bright's Election Cases*, 489.)
>
> Nothing short of an impossibility of ascertaining for whom the majority of votes were given ought to vacate an election, especially if by such decision the people must, on account of their distant and dispersed situation, necessarily go unrepresented for a long period of time. [McCrary, *A Treatise on the Law of Elections*, 489.]

If there has been a fair vote and an honest count, the election is not to be declared void because the force conducting it were not duly chosen or sworn or qualified. [6 Cannon's Precedents § 91.]

In the contested election case of *Reid* v. *Julian* [2 Hinds' Precedents §§ 881, 882], 41st Congress the committee in its report, House Report 116 stated that:

> It has long been held by all the judicial tribunals of the country, as well as by the decisions of Congress and the legislatures of the several States, that an entire poll should always be rejected for any one of the three following reasons:
>
> 1. Want of authority in the election board.
> 2. Fraud in conducting the election.
> 3. Such irregularities or misconduct as rendered the result uncertain. [2 Hinds' Precedents § 881].

In the Michigan election case of *Beakes* v. *Bacon* in the 65th Congress [6 Cannon's Precedents § 144], the same standards were reiterated.

Because the contestant's allegations and the relief he seeks fall under No. 3, "Such irregularities or misconduct as render the result uncertain," it is necessary to survey those instances in contested election cases wherein "such

irregularities or misconduct . . ." involved registration procedures. Consideration of the above-mentioned cases will, of necessity, involve an ancillary problem, the problem of the potential voter, because the House in its consideration of irregularities and misconduct has traditionally dealt not only with such irregularities and misconduct in a vacuum but also with their effect on the election, the effect of the irregularities on the potential voter, and the amount of proof necessary to overcome the regular election returns as a result of such irregularities.

It should be noted as a preface to the contests involving registration procedures that in these the contestant had made an attempt to show with a great deal of specificity how those who were disfranchised by the irregularities in registration would have voted had they been given the opportunity and that, in general, the contests revolved around this point rather than around the mere fact of irregularity or misconduct on the part of the registration officials. The fact that the contestant in the present case makes absolutely no attempt to make such a showing as to how those who were disfranchised by being stricken from the registration lists would have voted had they been given the opportunity thus removes his case somewhat from the scope of the precedents. The problem lies basically in the fact that the contestant does not carry forward his claim to the seat.

One contest which concerns itself with almost the same issues that are involved in the present contest is *Wilson* v. *McLaurin* [2 Hinds' Precedents § 1075] which arose out of an election in South Carolina for a seat in the 54th Congress. In the *Wilson* case the committee found that a South Carolina registration law needlessly disfranchised a significant number of otherwise qualified voters. The problems that the committee was then confronted with were (1) should the seat be declared vacant because of irregularities and (2) how to treat the potential vote of these individuals who should have been allowed to vote. In the following passage which is taken from the committee report, House Report 1566, 54th Congress first sess., particular attention should be paid to the manner in which the contestant attempted to prove that his claim to the seat was justified and the standards which the committee adopted in regard to such offers of proof.

> A majority of this committee has reached the conclusion that the voters of the district now in consideration, who were qualified under the constitution of South Carolina and who were rejected under color of the enforcement of the registration law, are entitled to be heard in this contest.
>
> In this conclusion no violence is done to the doctrine that "where the proper authorities of a State have given a construction to their own statutes that construction will be followed by the Federal authorities." While the supreme court of South Carolina has not passed decisively upon the statute in question the people themselves, the highest authority in that State have decreed its disappearance from the statute book.
>
> From this standpoint we look for the course to be followed. Shall the election be set aside and the seat in question vacated? Under the authorities we think not.
>
> Beyond doubt the usual formalities of an election were for the most part observed. No substantial miscount of

votes actually cast is alleged. There are no charges of violence or intimidation seriously affecting the result which have been verified. If fraud be alleged, under sanction of legislative enactment, it was a general fraud and the returns are in general unchallenged for correctness. The votes actually cast are not in controversy; the votes not cast are the ones presented for computation.

[McCrary], *Treatise on the American Law of Elections,* in section 483, says—

"The election is only to be set aside when it is impossible from any evidence within reach to ascertain the true result—when neither from the returns, nor from other proof, nor from all together can the truth be determined."

The same authority quotes the following (sec. 489):

"Nothing short of the impossibility of ascertaining for whom the majority of votes were given ought to vacate an election."

It is a matter of serious import and precedent to introduce into an election the count of a large disfranchised class. But if the principle is good as to 4 or 40 or 400 it should certainly be no less available for a large number; or, briefly, the number is immaterial if capable of correct computation.

In the case of *Waddill* v. *Wise,* [2 Hinds' Precedents § 1026] reported by the Committee on Elections to the House in the 51st Congress, the doctrine is discussed, the authority is collated, and the opinion adopted by the House expressed in these words ( p. 224):

"If the fraudulent exclusion of votes would, if successful, secure to the party of the wrongdoer a temporary seat in Congress, and the only penalty for detection in the wrong would be merely a new election, giving another chance for the exercise of similar tactics, such practices would be at a great premium and an election indefinitely prevented. But if where such acts are done the votes are counted upon clear proof aliunde the wrong is at once corrected in this House and no encouragement is given to such dangerous and disgraceful methods."

In following this opinion the testimony is presented for scrutiny.

A careful examination has been made of a record which covers 683 closely printed pages. The contestant claims to be allowed the votes of several thousand alleged voters, whose names are given, but whose qualifications rest upon varying testimony. These names of voters appear in lists executed in most of the election precincts on the day of the election, signed by the parties or by authorization, and (with few exceptions) are appended to a form of petition, which is as follows:

"To the Honorable Senate and House of Representatives of the United States in Congress assembled:

"The petition of the subscribers, citizens of the State of South Carolina, respectfully sheweth:

"That your petitioners are over the age of twenty-one (21) years and male residents of the county of _____, and the voting precinct of _____, in the county and State aforesaid, and are legally qualified to register and vote.

"That on this the sixth day of November eighteen hundred and ninety four, they did present themselves at said voting precinct in order to vote for Member of Congress, and that they were denied the right to vote.

"That your petitioners have made every reasonable effort to become qualified to vote according to the registration law of this State, but have been denied an equal chance and the same opportunity to register as are accorded to others of their fellow-citizens.

"Your petitioners desired and intended to vote for Joshua E. Wilson for Member of Congress.

"Wherefore your petitioners pray that you investigate the facts herein stated and the practical workings of the registration and election laws of this State and devise some means to secure to us the free exercise of the rights guaranteed to us by the constitution of this State and the laws and Constitution of the United States, and your petitioners will ever pray, etc., etc."

These petitions are not usually verified by affidavit, but are generally supplemented by testimony of those who had them in charge, with such explanations and corroborations as the witnesses could give.

It is considered by a majority of this committee that these lists are not per se evidence in the pending contest. They are declarations, important parts of which should be proven in accordance with usual legal forms. It is not impossible so to do, and consequently we think it is necessary for reaching trustworthy results.

Under the authority of *Vallandigham* v. *Campbell* (1 Bartlett, p. 31) these declarations might serve a use beyond a mere list for verification. For it was there held—

"The law is settled that the declaration of a voter as to how he voted or intended to vote, made at the time, is competent testimony on the point."

We propose to compute the ballots of those who were entitled to cast them, and there is ample support in a line of authorities and precedents. A few only are selected.

*Delano* v. *Morgan* (2 Bartlett, 170), *Hogan* v. *Pile* (20 Bartlett, 285), *Niblack* v. *Walls* (Forty-second Congress, 104, January, 1873), *Bell* v. *Snyder* (Smith's Rep., 251), are uniformly for—

"the rule, which is well settled, that where a legal voter offers to vote for a particular candidate, and uses due diligence in endeavoring to do so, and is prevented by fraud, violence, or intimidation from depositing his ballot, his vote shall be counted."

In *Bisbee, Jr.* v. *Finley* [2 Hinds' Precedents §§ 977–981], it was stated—

"as a question of law we do not understand it to be controverted that a vote offered by an elector and illegally rejected should be counted as if cast."

In *Waddill* v. *Wise* (supra) the same doctrine was elaborately discussed and a further step taken by holding—

"That the ability to reach the window and actually tender the ticket to the judges is not essential in all cases to constitute a good offer to vote."

Referring to the evidence given in connection with the lists in this record it seems proper to adopt some general principles as a standard for the examination, and the following have been used as suitable and in accord with the precedents quoted:

First. The evidence should establish that the persons named in the lists as excluded voters were voters according to the requisites of the constitution of South Carolina.

Second. The proof should show that said persons were present at or near the Congressional voting place of their respective precincts, for the purpose of voting and would have voted but for unlawful rejection or obstruction.

Third. That said excluded voters would have voted for the contestant.

Another election contest which involved irregularities in the application of a registration law resulting in the disfranchisement of a number of otherwise qualified voters was *Buchanan* v. *Manning* [2 Hinds' Precedents § 972] in the 47th Congress. In this contest the

evidence of a disqualification of potential voters was somewhat stronger than in the present case because it appears that the registrars unlawfully refused to register "many electors." In regard to such action by the registrars, its effect on the election, and the efforts which are necessary for a potential voter to undertake in order that his vote may be counted the committee investigating the matter held:

> It appears in the evidence that very many electors in the various counties of this district were deprived of the right of voting because they were not registered. The registry law of Mississippi provides the manner in which registration shall be made. An unlawful refusal on the part of the registration officers to register a qualified elector is a good ground for contest; but in order to make it available the proof should clearly show the name of the elector who offered to register; that he was a duly qualified voter, and the reason why the officer refused to register him, and, under the statutes of the United States, if he offered to perform all that was necessary to be done by him to register, and was refused, and afterwards presented himself at the proper voting place and offered to vote and again offered to perform everything required of him under the law, and his vote was still refused, it would be the duty of the House to see to it that he is not deprived of his right to participate in the choice of his officers. Unfortunately, in this case the proof falls far short of that which is required to enable the House to apply the proper remedy. That there were many instances in which the officers of the registration arbitrarily refused to do their duty is apparent. That many electors were deprived of their right to vote in consequence of this action is also apparent; but in going through the testimony in this case the number thus refused registration and refused the right to vote if added to contestant's vote would not elect him. Neither is it shown sufficiently for whom the nonregistered voters would have voted had they been allowed that right.

As can be seen from the above mentioned cases the problem involved not so much the registration irregularities themselves but, rather, conceding the irregularities, the amount of and nature of the proof required of the contestant to substantiate his claim of a right to the seat in question. Where the proof offered by the contestant shows how those who were not permitted to vote would have voted and that they tendered a vote and were wrongfully rejected, the House has generally found that this is sufficient to warrant counting the votes as cast. Then if in counting these votes the contestant receives more votes than the contestee he gets the seat. This line of reasoning conforms with the earlier stated standard of preserving and correcting the return if it is at all possible, and with the concept that contestant bears the burden of proof in seeking to have certified returns rejected.

The House of Representatives has rather consistently been hesitant in declaring a seat vacant preferring rather to measure the wrong and correct the returns, if this is at all possible.

This preference for protecting the initial returns and correcting them if the evidence shows that they are incorrect is amply illustrated in the contests wherein fraud has been proven, and in contests involving possible rejection of returns. In fact in the index to *Hinds and Cannon* under Election of Rep-

resentatives, section 376 is entitled "Returns, Purging of.—Not To Be Rejected If Corrections May Be Made" and section 377 is entitled "Returns, Purging of.—Not To Be Rejected Even for Fraud If Correction May Be Made." Under these two headings are three full pages of citations.

Considering the above precedents along with the statement from the committee report in the election contest of *Gormley* v. *Goss* [§ 47.9, supra], House Report No. 893, 73d Congress, second session wherein it was held that:

> . . . your committee has been guided by the following postulates deemed established by law and the rules and precedents of the House of Representatives:
>
> 1. The official returns are prima facie evidence of the regularity and correctness of official action.
>
> 2. That election officials are presumed to have performed their duties loyally and honestly.
>
> 3. The burden of coming forward with evidence to meet or resist these presumptions rests with the contestants. It is clear that the contestant in this case has failed to meet these presumptions and requirements.
>
> The major flaw in the contestant's case is that he fails to carry forward with his claim to the seat as required by the precedents of the House of Representatives and the Federal Contested Election Act. A bare claim to the seat as the contestant makes in his notice of contest without substantiating evidence ignores the impact of this requirement and any contest based on this coupled with a request for the seat to be declared vacant must under the precedents fail. The requirement that the contestant make a claim to the seat is not a hollow one. It is rather the very substance of any contest. Such a requirement carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone could seat the contestant.
>
> That the contestant in the present case fails to do this is quite clear. If all of his allegations were found to be correct he would still not be entitled to the seat. It is perhaps stating the obvious but a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly. It involves the possibility of rejecting the certified returns of a state and calling into doubt the entire electoral process. Thus the burden of proof placed on the contestant is necessarily substantial.
>
> In this case the contestant has not met this burden of proof. He makes no substantial offer to show any of the following elements, much less all of them which are necessary to his case: (1) that those whose names were stricken from the registration list were, at the time of the election, qualified resident voters of the 38th Congressional District of California; (2) that those whose names were so stricken offered to vote; and (3) that a sufficient number to change the result offered to vote and were denied by election officials because their names had been stricken from the registration lists would have voted for the contestant had they not been so denied. Had all of the criteria been met then it would have been incumbent upon the committee to pass, in the first instance, on the actions of the registrars in Riverside County and then on the validity of the evidence offered, but such is not the ease here.
>
> The type of relief that the contestant seeks is not a proper one. The contestant is limited, as was noted above, to claiming the seat in question and offering proof to substantiate that claim. Declaring a vacancy in the seat is one of the options

available to the House of Representatives and is generally exercised when the House decides that the contestant, while he has failed to justify his claim to the seat, has succeeded in so impeaching the returns that the House believes that the only alternative available to determine the will of the electorate is to hold a new election.

The committee also takes note of the time factor involved in the contest. It appears from the record available to the committee that the contestant had, at the very minimum, three months notice in advance of the election of the actions here protested of the registrars. It would seem that if the contestant had any reservations about such actions the proper forum in which to test such reservations would have been the California courts. In election matters the courts have generally been inclined to expedite the case and we feel certain that such would have been the case in California had the contestant chosen to so act. From the record it appears rather that the contestant decided to take his chances and we feel constrained to abide by that decision.

On Nov. 9, 1971, Mr. Abbitt, by direction of the Committee on House Administration, called up House Resolution 507 (accompanying H. Rept. No. 92–626) which provided:

H. RES. 507

*Resolved*, That the election contest of David A. Tunno, contestant, against Victor V. Veysey, contestee, Thirty-eighth Congressional District of the State of California, be dismissed.

The resolution dismissing the contest was agreed to by the House and a motion to reconsider was laid on the table.[11]

*Note:* Syllabi for Tunno v Veysey may be found herein at § 35.7 (burden of showing results of election would be changed); § 35.8 (burden of establishing claim to seat); § 42.11 (disposal by resolution declaring seat vacant).

**11.** 117 CONG. REC. 40017, 92d Cong. 1st Sess.

# APPENDIX TO CHAPTER 9

*Note.*—Chapter 9 discusses contested election cases in the House of Representatives beginning with the year 1931. This appendix to Chapter 9 contains a digest of contested election cases for the years 1917 through 1931 (the 65th through the 71st Congresses), arranged by Congress and case name. It was thought necessary to include this material in an appendix to provide a more comprehensive coverage than now exists of election cases for the years cited.

Contested election cases from the first 64 Congresses have been presented in other works. In 1901, Mr. Chester H. Rowell completed preparation of a digest of all contested election cases in the House of Representatives from the 1st through the 56th Congresses. Mr. Rowell's intention was to summarize earlier compilations of such cases. As he stated in a preface to his work:

> Most of the reports in the first fifty-two Congresses are included in the nine volumes known from the name of their compilers as: (1) Clarke and Hall (First to Twenty-third Congress), (2) 1 Bartlett (Twenty-fourth to Thirty-eighth Congress), (3) 2 Bartlett (Thirty-ninth to Forty-first Congress), (4) Smith (Forty-second to Forty-fourth Congress), (5) 1 Ellsworth (Forty-fifth and Forty-sixth Congresses), (6) 2 Ellsworth (Forty-seventh Congress), (7) Mobley (Forty-eighth to Fiftieth Congress), (8) Rowell (Fifty-first Congress), and (9) Stofer (Fifty-second Congress).

The volumes referred to, he noted, were largely unedited and in some degree incomplete. To correct these deficiencies, Mr. Rowell compiled his one-volume digest, the first half of which contained condensations of case reports arranged chronologically by Congress, with headnotes and a summary of actions taken by the House. The second part of Mr. Rowell's work consisted of a digest of the law and precedents established by the cases.

In 1919, Mr. Merrill Moores continued the presentation of contested election cases by compiling a digest of such cases in the House arising from the 57th through the 64th Congresses (1901–1917). (See H. Doc. No. 2052, 64th Cong.)

It is hoped that Chapter 9 and this appendix thereto, together with the above-mentioned works, will provide a sufficiently comprehensive treatment of all precedents arising from contested election cases.

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**Commentary and editing by Assistant Parliamentarian Charles W. Johnson.**

# *Election Contests, 1917–31*



§ 1. Sixty-fifth Congress, 1917–19
§ 2. Sixty-sixth Congress, 1919–21
§ 3. Sixty-seventh Congress, 1921–23
§ 4. Sixty-eighth Congress, 1923–25
§ 5. Sixty-ninth Congress, 1925–27
§ 6. Seventieth Congress, 1927–29
§ 7. Seventy-first Congress, 1929–31

**INDEX TO APPENDIX**

**Abatement of contest**
failure of House to act upon elections committee report
report in contestee's favor, § 3.5
report recommending unseating of contestee, § 7.4
neglect of contestant to take testimony within legal time
no committee or House disposition, § 6.1
withdrawal of contestant, §§ 5.1, 6.2, 6.3
withdrawal of contestant presumed where brief not filed, § 5.3
**Ansorge v Weller (N.Y.), § 4.6**
**Answer to notice of contest**
late filing not grounds for unseating contestee, where not prejudicial to contestant, § 3.4
**Apportionment**
time of decennial reapportionment under Constitution held discretionary; Member-elect denied seat where state's representation would otherwise exceed that permitted by existing law, § 4.4
**Bailey v Walters (Pa.), § 5.4**
**Ballot box, custody of**
failure to observe directory state law regulating custody of ballots held not to void recount where evidence overcame presumption of tampering, § 5.4
improper commingling of boxes between precincts after election as not affecting validity of ballots therein that had been counted in the official return, § 1.1
recount denied by committee where ballots improperly preserved after election, § 3.7
resolution adopted by House authorizing committee to subpena election officials, ballots, and ballot boxes, §§ 7.3, 7.4
temporary loss of boxes rendered ballots not counted in official return void for lack of proper preservation, but loss held not grounds for rejection of total returns, § 1.1
**Ballots** (see also **Fraud, marking and custody of ballots; Evidence, sufficiency of proof**)
absentee ballots invalid where lack of voter domicile not proven, § 3.5
arrangement and printing
party designations, allegations of impropriety of, not sustained, § 5.3
custody and preservation by local election officials
absentee ballots not rejected absent fraud where state law reasonably interpreted not to require preservation by officials, § 3.5

**Ballots** —Continued
custody and preservation by local election officials—Continued
recount not conducted by committee where ballots not properly preserved after election, § 3.7
state law regulating custody of ballot box held directory; where evidence overcame presumption of tampering, noncompliance held not to void recount, § 5.4
state law requiring sealed ballot box held directory; ballots in unsealed box remained best evidence and may be recounted by officer appointed to take testimony, §1.1
valid, ballots held to be, where contained in commingled boxes counted in official returns and verified by recount, § 1.1
void, ballots held to be, where contained in mislaid unsealed boxes not counted in official returns, § 1.1
evidence, obtaining ballots as (see also Evidence)
resolution authorizing committee to subpena disputed ballots, § 4.6
resolution authorizing committee to subpena officials and disputed ballots, §§ 2.1, 4.2, 5.4
resolution authorizing committee to subpena officials, ballots, and ballot boxes, §§ 7.3, 7.4
resolution in part requiring territory Governor to forward returns and ballots to House for examination, § 2.6
machines, voting, as not conforming to requirements of state law, §1.5
marking by voter
ballots written by voter, though unavailability of official ballot was not properly certified by election officials, held valid, § 1.4
examination and recount by committee where ballots marked by someone other than voter, § 5.4
irregularities in marking for candidates for other offices held not to be identifying marks prohibited by law, and ballots held valid where voter intent clear, § 1.2
single name written ballots not also marked with "X" as required by mandatory state law voided by House, overruling majority report, § 1.6
write-in or sticker votes for contestant properly placed on ballot but absent the corresponding crossmark required by state law to be placed opposite such name, were held valid as voter intent was clear, § 2.1
recount, complete, by committee
denied by committee where no evidence impeached correctness of official returns in undisputed precincts, § 5.4
general election, recount of ballots cast in, to determine whether deceased predecessor or contestee seated as result of special election had been elected, § 2.6
not ordered by committee where all ballots and ballot boxes shown improperly preserved, § 3.7
recount, complete, by official appointed to take testimony
recount upon stipulation of parties changed official election result, § 1.1
recount, complete, by parties
followed by partial recount by committee of ballots remaining in dispute, §§ 4.2, 4.6
recount, complete, by state election officials

**Ballots** —Continued
recount, complete, by state election officials—Continued
result of recount conducted upon stipulation of parties held binding on contestant and considered grounds for denying application for partial committee recount, § 3.2
recount, partial, by committee
absentee ballots of military personnel not recounted where remaining committee recount would not be affected, § 2.7
authorized to be conducted upon adoption by House of resolution authorizing subpena of officials and disputed ballots, § 5.4
authorized to be conducted upon adoption by House of resolution authorizing subpena of officials, ballots, and ballot boxes, §§ 7.3, 7.4
conducted as to ballots fraudulently marked by person other than voter, § 5.4
conducted as to ballots still disputed after complete recount by parties, §§ 4.2, 4.6
conducted in all precincts where fraud or irregularities alleged, § 2.7
conducted upon adoption by House of resolution authorizing subpena of officials and disputed ballots, § 5.4
conducted where ballot box was improperly preserved but evidence overcame presumption of tampering, § 5.4
denied by committee after parties conducted complete recount and stipulated that results would not be changed, § 5.2
denied by committee, as only a complete recount should be ordered where some error in official returns is shown, § 3.7
denied by committee where complete recount conducted by state election officials was held binding on parties, where results would not be changed, and where fraud was not proven, § 3.2
denied by committee where contestant delayed submission of evidence and offered insufficient proof of allegations of fraud and irregularities to change election results, § 4.7
denied by committee where contestant did not prove that results would be changed by counting ballots wrongfully rejected by election officials, § 6.5
motion, recount conducted on, after House had authorized subpena of ballots, § 7.3
secondary evidence used where ballots not available as best evidence, § 2.4
tie, recount conducted after separate recounts by parties resulted in, § 1.2
write-in and sticker votes disputed at state recount or during taking of evidence, recount of, upon adoption of resolution authorizing subpena of officials and disputed ballots, § 2.1
recount, partial, by official appointed to take testimony
followed by partial committee recount of ballots remaining in dispute, § 5.4
insufficient evidence, considered to be, where the election result was not changed, § 3.8
recount, partial, by parties
tie, separate recounts resulting in, followed by committee recount, § 1.2
recount, partial, by state election officials
denied for want of state law authority, § 5.4
error in official returns, recount conducted upon stipulation of parties as disclosing, § 1.1
secrecy of

**Ballots** —Continued
secrecy of—Continued
irregularities in marking for candidates for other offices held not to be identifying marks prohibited by law, and ballots held valid where voter intent clear, § 1.2
violations by election officials of state constitution and statutes requiring preservation of secrecy of ballots were held to void ballots cast in affected precincts, § 3.6
**Beakes v Bacon (Mich.), § 1.1**
**Beck, investigation of qualifications of (Pa.), § 6.4**
**Bodenstab v Berger (Wis.), § 2.5**
**Bogy v Hawes (Mo.), § 3.2**
**Bracken, memorial of (Pa.), § 3.1**
**Britt v Weaver (N.C.), § 1.6**
**Brown v Green (Fla.), § 5.1**
**Campbell v Doughton (N.C.), § 3.5**
**Carney v Berger (Wis.), § 2.2**
**Chandler v Bloom (N.Y.), § 4.2**
**Clark v Edwards (Ga.), § 5.3**
**Clark v Moore (Ga.), § 4.3**
**Clark v White (Kans.), § 6.2**
**Cole, claim of, to seat (Tex.), § 4.4**
**Contestant**
not entitled to seat upon exclusion of contestee where not receiving plurality of votes cast, § 2.2
not entitled to seat upon exclusion of contestee where not receiving plurality of votes cast, though voters had notice of contestee's ineligibility, § 2.5
petitioner (memorialist), unsuccessful candidate receiving highest number of votes of all candidates not elected at large, held not entitled to seat upon death of Member-elect at-large, § 3.1
standing, lack of, to institute contest where evidence not forwarded to House within legal time, § 4.5
standing, lack of, to institute contest where evidence not taken within legal time (although extensions stipulated by parties), where delay not excusable, § 3.8
unsuccessful candidate in general election not entitled to seat where ballots cast for contestee with questionable qualifications are not clearly void, § 7.2
**Contestee**
admission by contestee of fraud sufficient to change results; contestee unseated, § 7.1
committee majority finding that contestee had knowledge that certain relatives were unqualified voters, and that he sanctioned frauds by party workers, considered grounds for recommendation of unseating, though such recommendation was not acted upon by House, § 7.4
death of, prior to certification; new Delegate-elect substituted as contestee after his election to fill vacancy, § 2.6
unethical actions by counsel for, held not attributable to, § 4.7
**Corrupt Practices Act, Federal**
alleged violations by candidate during primary election held insufficient, based on advisory opinion of Attorney General construing Supreme Court opinion holding act invalid with respect to nominations, § 3.4

**Corrupt Practices Act, Federal—Continued**
limitation on expenditures by candidate-resolution proposing special investigation of seated Member's expenditures reported adversely by elections committee and laid on table by House, § 4.1
limitations on contributions to candidate, violation by contestee's committee of, held grounds for unseating contestee, § 2.7
timely filing of statements of receipts and expenditures in general election, provisions requiring, held directory; noncompliance held not grounds for unseating contestee where attempted compliance shown, § 3.4
unethical campaign practices held not prejudicial to contestant where committed against another candidate and not attributable to contestee, § 3.5
**Davenport v Chandler (Okla.), § 1.3**
**Decisions by the House (**see also **Qualifications of Member; Elections committee, investigations by, Abatement of contest)**
generally
candidate elected to seat in excess of state seat entitlement in House held not entitled to seat, § 4.4
discharge of elections committee from further consideration of contest, as per committee's reported recommendation, where contestant guilty of laches in offering evidence and where evidence was insufficient to justify recount of disputed ballots, § 4.7
Member-elect permitted to be sworn pending election committee determination of final right based on inhabitancy qualification, § 6.4
memorialist receiving most votes of those candidates not elected at-large held not elected as Representative at-large where Member-elect had died prior to certification, § 3.1
recommendations of elections committee adopted by House
report for contestee (or seated Member), who was held entitled to seat by House, §§ 1.2, 1.3, 1.5, 2.4, 3.2–3.4, 3.7–3.9, 4.3, 4.5, 4.6, 5.1–5.4, 6.2 6.5, 7.2, 7.3, 7.5
report of majority for contestant, who was seated, §§ 2.1, 2.6, 3.6
report, unanimous, for contestant, who was seated, §§ 1.1 1.4, 2.7, 7.1
resolution providing for referral to select committee of question of final right of Member to seat reported adversely by elections committee, and laid on table by House, Member retaining seat, § 4.1
seated Member held entitled to retain seat, § 2.3
recommendations of elections committee rejected by House
majority report for contestant rejecting precinct returns for violation of mandatory state law and for officials' fraud, overruled by House, which adopted minority report validating returns where election officials acted under color of authority and where fraud not proven by contestant, § 4.2
majority report for contestee overruled by House seating of contestant, § 1.6
vacancy, declaration of (see also Vacancy)
death of Member-elect at-large prior to certification; unsuccessful candidate receiving most votes of all candidates not elected at-large held not entitled to seat, and seat therefore declared vacant, § 3.1
incidents of persons fraudulently claiming domicile in certain precincts were held sufficient grounds for rejection of entire returns from such precincts, though insufficient to justify declaration of vacancy, § 2.1
seat declared vacant upon exclusion of contestee and upon declaration that contestant as unsuccessful candidate was not entitled to seat, § 2.2

**Elections committee (Committee on House Administration)**
investigations by
House adopted privileged resolution authorizing subpoena of returns and election officials, § 7.1
House adopted resolution authorizing subpoena of election officials, ballots, and ballot boxes, §§ 7.3, 7.4
House adopted resolution reported by elections committee authorizing subpoena of election officials and disputed ballots by that committee, §§ 4.6, 5.4
inhabitancy qualification of Member-elect, investigation of, instituted by resolution referring question of Member's final right to seat to the committee, § 6.4
procedures of
established categories of disputed ballots, § 4.6
filing of brief after legal time with consent of contestee permitted, § 6.5
reports of (see also Decisions of the House)
adverse—of resolution proposing special committee investigation of alleged violation of Corrupt Practices Act by Member, § 4.1
committee members split on legal bases for unanimous recommendation that seven-year citizenship requirement was fulfilled by woman Member-elect, § 7.2
findings of other elections committees in contests considered concurrently were incorporated by reference, § 3.9
instance of summary disposition of resolution without accompanying printed report, § 1.3
majority recommendation that contestee be unseated was not accompanied by a resolution, § 7.4
minority recommended resolution that contestant be held not entitled to seat and that contestee retain seat, § 7.4
minority views against validity of majority report, § 7.4
point of order that report not authorized, due to inconsistent actions taken in committee, was reserved, § 7.4
point of order that report not timely filed was reserved, § 7.4
summary report recommending the unseating of contestee and seating of contestant did not detail the election official frauds conceded by contestee to have prevented contestant's election where such facts were undisputed and were available in committee records, § 7.1
time for filing extended by House, § 7.5
**Election laws: federal** (see also **Corrupt Practices Act**)
governing contested elections
statute requiring submission of evidence within certain period held mandatory as to parties who could not stipulate to extensions, § 4.7
mandatory or directory; precedence over state action
held to invalidate territory legislature act repealing precinct residence requirement of federal organic law, § 2.6
setting time for opening and closing polls in territory held mandatory, § 2.6
statute requiring submission of evidence within certain period held mandatory as to parties who could not stipulate to extensions, § 4.7
U.S. constitutional provision requiring decennial reapportionment by Congress held discretionary as to time of enactment, and to preclude House from itself increasing total membership; and thereby to deny Member-elect with regular credentials a seat in excess of state entitlement under existing law, § 4.4

**Election laws: federal** —Continued
mandatory or directory; precedence over state action—Continued
where organic law required notice before changing polling places in territory, violation by election officials' order held to void returns from precinct, § 2.6
**Election laws: state**
directory or mandatory
construed by election officials to deny them authority to conduct partial recount, § 5.4
prescribing ballot form and permitting written ballots when official formsunavailable held directory, § 1.4
regulating custody of ballot boxes held directory, § 5.4
regulating custody of ballot boxes held directory and not to prevent recount of ballots therein, where evidence overcame presumption of tampering, § 5.4
requiring registration numbers on ballots held mandatory, but rejection of returns mooted as result not changed by such violation, § 2.4
requiring sealing of ballot boxes held directory, § 1.1
requiring "X" marking of ballots containing single written name held mandatory by House, § 1.6
state constitutional requirement of unassisted handwritten application for registration held mandatory, § 3.6
state law requiring bipartisan judges, prohibiting assistance to voters and requiring proper custody of ballots held mandatory, § 3.6
state law requiring rejection of ballots not signed by election officials held not binding on House where voter intent clear, § 6.5
interpretation and applicability of
allegation that statute requiring numbering of ballots violated state constitution was considered by an elections committee, § 2.4
allegation that statutes governing balloting by machines violated state constitution was not considered by an elections committee where basic issues involved policy questions determinable by state legislature and courts, § 1.5
construed by election officials to deny them authority to conduct partial recount, § 5.4
state law requiring rejection of ballots not signed by election officials held not binding on House where voter intent clear, § 6.5
poll tax and literacy requirement of state constitution
general failure to observe statutory requirements by election and party officials censured but held not to void election, absent fraud, where election result not affected, § 3.5
**Evidence**
best evidence
ballots are, and testimony of witness making tally at partial recount conducted by official appointed to take testimony is inadmissible where ballots are not offered in evidence before the committee, § 3.7
ballots in unsealed boxes remain, and may be counted absent evidence of tampering, § 1.1
burden of proof on contestant to show voters unqualified, § 2.7
ex parte evidence taken by contestant held inadmissible, §§ 2.6, 3.2
prima facie evidence, official returns are, of correctness of election. § 3.7
sufficiency of proof
allegations by both parties of fraud not sustained, § 6.5
alphabetical listing of names in poll books established fraud by election officials, § 2.7

**Evidence—Continued**
sufficiency of proof—Continued
ballots cast by Indians validated upon failure to show specific voters not qualified, § 1.4
committee minority findings that contestant had proven voter disqualification irregularities sufficient to change election results were accepted by House despite committee majority findings of insufficiency, § 1.6
contestant failed to support allegations of fraudulent and irregular partisan registration activities, § 3.3
contestant failed to support allegations of registration and voting frauds, § 3.2
contestant failed to support allegations where proffered recount conducted by official taking testimony did not change results, § 3.8
contestant failed to sustain allegations of fraud and conspiracy to defraud by election officials, § 5.2
contestant failed to sustain allegations of fraud and irregularities sufficient to change election results by showing disputed ballots irregularly marked by voters; partial recount therefore denied, § 4.7
contestant failed to sustain allegations of fraud by election officials, § 4.3
contestant's allegations of fraud and irregularities in machine balloting not sustained where basic issues involved questions of state law policy determinable by state legislature and courts, § 1.5
evidence of fraudulent marking of ballots after cast held insufficient where an insignificant number of ballots were challenged, § 3.9
time for taking
contest abated where contestant failed to take within legal time, § 6.1
extension of, denied by committee where delay not excusable, § 5.2
House authorized extension, where contestee's death prevented timely taking, § 2.6
not forwarded to House by designated official within legal time, contestant held without standing to institute contest, § 4.5
not taken by contestant within legal time, held to discharge elections committee from contest, though parties agreed to extensions, where delay not excusable and where law and committee rules violated, § 4.7
not taken by contestant within legal time held inadmissible though parties stipulated to extensions, where delay not excusable, § 3.8
not taken by contestant within legal time inadmissible where extension not sought and parties' stipulations not binding on House, § 3.7
**Expenses of contest**
denied to contestant by elections committee, § 5.3
elections committee has discretion in awarding, § 6.2
**Farr v McLane (Pa.), § 2.7**
**Frank v LaGuardia (N.Y.), § 4.7**
**Fraud** (see also **Evidence, sufficiency of proof**)
by contestee
improper preservation and counting of ballots by election officials and party workers and sanction thereof by contestee, and knowledge of contestee that certain voters were unqualified, considered grounds by committee majority for recommendation that contestee be unseated, where frauds were sufficient to change election results; no House disposition. § 7.4
by election officials
ballots marked by officials or east by nonqualified voters upon inducement of election officials, invalidated, § 2.7

**Fraud** —Continued
by election officials—Continued
contestant's allegation of fraudulent remarking of small number of cast ballots did not show sufficient official corruption for rejection of entire returns, § 3.9
contestant's allegations of conspiracies, of destruction of ballots, and of acts by unqualified officials not substantiated, § 4.3
improper preservation and counting of ballots by election officials and party workers and sanction thereof by contestee, and knowledge of contestee that certain voters were unqualified, considered grounds by committee majority for recommendation that contestee be unseated, where sufficient to change election results; no House disposition, § 7.4
in precincts where one-third of voters were fictitiously registered, where other illegal acts were committed by party workers for contestee, and where contestee failed to prove that remaining qualified voters therein had voted for him, resulted in total rather than proportional rejection of returns, as elections committee considered the frauds more prevalent than those proven, § 2.1
instance where unfair counting and forgery practices sufficient to change the election result were needed by contestee, who was unseated and contestant seated, § 7.1
majority finding of fraud in casting, counting, and custody of ballots and of intimidation at polls, overruled by House where allegations were not proven by contestant, § 4.2
not proven by contestant's receiving fewer ballots than candidates of his party for other offices, § 3.2
conspiracy to defraud
contestant's allegations of conspiracies, destruction of ballots, and acts by unqualified officials not substantiated, § 4.3
not proven by evidence of election official's inefficiency in respect of timely opening of polls, § 3.5
marking and custody of ballots (see also Evidence, sufficiency of; Ballots, marking of by voter)
ballots marked by election officials or by unqualified voters upon inducement of officials held invalid, § 2.7
ballots were examined and recounted by committee where marked by person other than the voter, § 5.4
contestant's allegation of fraudulent remarking of small number of ballots already cast did not show sufficient official corruption to justify rejection of entire returns, § 3.9
**Gartenstein v Sabath (Ill.), § 3.7**
**Gerling v Dunn (N.Y.), § 1.5**
**Golombiewski v Rainey (Ill.), § 3.9**
**Gorman v Buckley (Ill.), § 4.5**
**Hill v Palmisano (Md.), § 7.4**
**Hubbard v LaGuardia (N.Y.), § 6.3**
**Kennamer v Rainey (Ala.), § 3.3**
**Lawrence v Milligan (Mo.), § 7.3**
**Lawson v Owen (Fla.), § 7.2**
**Miller, eligibility of (Ill.), § 4.1**
**Notice of contest**
sufficiency of

**Notice of contest—Continued**
sufficiency of—Continued
lack of particular specifications did not prevent decision by committee on merits, § 1.5
time and manner of serving
not served upon contestee within legal time, held grounds for dismissal of contest, § 6.2
where not served in required time and delay not excusable, contestant enjoined by federal court from proceeding with contest, and petition denied by committee, § 2.3
**Officials of elections**
irregularities by (see also Registration; Fraud)
alteration of tally sheets to correct error, absent fraud, held no grounds for rejection of returns, § 2.4
assisting voters at registration and at polls, and failure to maintain proper custody and secrecy of ballots, held violative of mandatory state law, § 3.6
committee majority recommended partial rejection of returns on grounds of election official fraud and irregularities sufficient to change results; no House disposition, § 7.4
failure to certify unavailability of official ballots held not to invalidate written ballots under directory state law, § 1.4
in counting ballots, resulted in separate recounts by parties and then in partial committee recount, § 1.2
permitting unregistered voters to east ballots held not to have materially affected election result, § 3.3
relation of oath and qualifications to acts of
returns not rejected by House where improperly qualified or unsworn officials acted under color of authority, § 4.2
**Parillo v Kunz (III.), § 3.8**
**Paul v Harrison (Va.), § 3.6**
**Pleadings (**see also **Elections committee, procedures of)**
failure of contestant to file brief presumed a withdrawal of contest, § 5.3
filing of brief by contestant after legal time with consent of contestee permitted by committee, § 6.5
noncompliance with committee rule requiring filing of pertinent evidence with brief and contestant's refusal to attend hearings held grounds for dismissal, § 3.9
questions raised in, were mooted by committee recount, § 1.2
though committee rule requiring filing of abstract of evidence with brief not complied with by contestant, committee considered merits, § 3.2
**Qualifications of Member**
citizenship qualification
majority of elections committee considered years of citizenship requirement to be cumulative; remaining Members construed "Cable Act" to reestablish contestee's consecutive citizenship, § 7.2
seven-year U.S. citizenship requirement, of woman Member-elect who had forfeited citizenship by marriage to alien and who had then been naturalized less than seven years before election, held fulfilled, § 7.2
inhabitancy in state when elected
requirement held fulfilled where Member maintained "ideal" or intended residence when elected, as evidenced by voting and tax payments, though actual residence was in another jurisdiction, § 7.5

**Qualifications of Member—Continued**
inhabitancy in state when elected—Continued
requirement held satisfied where Member lived in leased apartment in state for part of each week and belonged to "body politic" of state, though owning residences in other jurisdictions, § 6.4
loyalty
elections committee concurred in House finding of disqualification of Member-elect, elected to fill vacancy caused by his initial exclusion, for having given aid or comfort to enemy, § 2.5
elections committee concurred in special committee findings of disqualification of Member-elect for having given aid or comfort to U.S. enemy, § 2.2
**Rainey v Shaw (Ill.), § 3.4**
**Recount, see Ballots**
**Reeves, memorial (Mo.), § 2.3**
**Registration**
ballots cast by transient voters not properly registered in new precincts held invalid, § 4.2
contestant not prejudiced by denial of access to registration books by election officials, § 3.5
contestant not prejudiced where officials registered voters of contestee's party in addition to mandatory bipartisan registration, where such partiality was permitted by state law, § 3.5
contestant's allegations of illegal partisan registration practices by officials of contestee's party held not to have materially affected election result, § 3.3
numerous incidents of merchants' and municipal employees' fraudulently claiming domicile to participate in local elections were held sufficient grounds for rejection of entire returns in certain precincts, though insufficient to justify declaration of vacancy, § 2.1
state constitution requiring unassisted handwritten applications by voters, held mandatory, voiding ballots cast by voters not so registered but not voiding ballots of voters filing defective unassisted written ballots supported by oral examination under oath, § 3.6
where committee divided on question of sufficiency of proof of registration, ballots allegedly cast by unregistered voters were not voided where election result not changed, § 5.4
**Returns** (see also **Ballots, generally**)
in general
prima facie evidence of correctness of returns only overcome by recount of all ballots as best evidence, § 3.7
recount of ballots denied where no evidence offered to overcome presumption of correctness in undisputed precincts, § 5.4
custody of, taken by House
House adopted privileged resolution authorizing committee to subpena returns and election officials, § 7.1
not rejected
by House where election officials acted under color of authority and where contestant did not sustain allegations of fraud, thereby overruling majority committee report, § 4.2
where contestant's evidence of fraudulent markings of ballots was held insufficient, § 3.9
where election officials altered tally sheets to correct errors, absent fraud, § 2.4
where election officials were negligent in signing certificates, § 2.6

**Returns** —Continued
not rejected —Continued
where one ballot box not properly preserved, § 1.1
where polls remained open after legal time, absent fraud, § 2.7
rejection of (entire or partial)
ballots cast by aliens who would not testify for which candidate they had voted were invalidated by the proportional deduction method, § 5.4
based on recount by official appointed to receive testimony, confirmed by committee, § 1.1
based on recount by parties, accepted by committee, § 1.1
by proportional deduction method, where nonregistered voters cast unidentified ballots absent official fraud, § 2.7
by proportional deduction method, where not determinable for whom invalid ballots were cast, §§ 1.4, 2.6, 2.7, 5.4
entire precincts rather than by proportional deduction where one-third of voters were fraudulently registered, where additional frauds were suggested, where contestee failed to prove that remaining valid votes had been cast for him, and where illegal votes were not cast pro rata between parties, § 2.1
entire precincts, rejection in, where election officials' fraud or irregularities violated mandatory state registration law; by proportional deduction in other precincts where not determinable for whom illegal votes cast; or to extent of proven illegal votes, § 3.6
entire precincts, rejection in, where official misconduct and unqualified voters proven, § 2.7
from precincts in territory where organic law setting time for opening and closing polls was violated, § 2.6
from precincts where polling places were improperly changed, § 2.6
recommended by committee majority on grounds of fraud and irregularities by election officials and party workers sufficient to change results and fraud (insufficient to change results) by contestee, § 7.4
where ballots cast without registration numbers as required by mandatory state law, question moot as not changing total result, § 2.4
where ballots marked by election officials, § 2.7
where ballots were cast by various types of unqualified voters, § 2.7
where polling places illegally changed, § 2.7
where voters cast more than one ballot, § 2.7
tally sheets
altered to correct errors by election officials, absent fraud, held not grounds for rejection of returns, § 2.4
**Salts v Major (Mo.), § 2.4**
**Sirovich v Perlman (N.Y.), § 5.2**
**Steele v Scott (Iowa), § 1.2**
**Suffrage** (see also **Registration**)
Indians
born in territory and severed from tribe, permitted to vote as citizens, §§ 1.4, 2.6
military
ballots cast by personnel involuntarily stationed in territory, rejected, §§ 1.4, 2.6
noncitizens
ballots cast by aliens who refused to testify for which candidate they had voted were invalidated by proportional deduction method, § 5.4

**Suffrage** —Continued
noncitizens—Continued
ballots cast by women citizens married to aliens prior to passage of "Cable Act" held void based on Supreme Court decision upholding loss of citizenship as the result of such marriage prior to passage of the act, § 5.4
nonresidents
ballots cast by nonresidents of precinct or territory were rejected, §§ 1.4, 2.6
poll tax
ballots cast by voters not paying were rejected, § 3.6
poll tax and literacy requirement of state constitution
general failure to observe state requirements by election and party officials condemned but held not to void election, absent fraud, where election result not changed, § 3.5
right of, generally
held not denied by election officials, § 3.3
women voters
ballots cast by women citizens married to aliens prior to passage of "Cable Act" held void based on Supreme Court decision upholding loss of citizenship as result of such marriage prior to passage of act, § 5.4
not denied right to register or vote by conspiracy of state legislature, § 3.3
**Tague v Fitzgerald (Mass.), § 2.1**
**Taylor v England (W. Va.), § 6.5**
**Updike v Ludlow (Ind.), § 7.5**
**Vacancies** (see also **Decisions of the House**)
death of contestee prior to certification, territory Governor called special election to fill vacancy caused by; new Delegate-elect seated but finally unseated when House determined that deceased predecessor had not been elected at general election, § 2.6
death of Member-elect at-large prior to certification; unsuccessful candidate receiving most votes of all candidates not elected at-large held not entitled to seat, § 3.1
declared upon exclusion of contestee and upon declaration that contestant as unsuccessful candidate was not entitled to seat, § 2.2
fraudulent registrations in certain precincts were held grounds for rejection of entire returns from such precincts, but insufficient to justify declaration of vacancy, § 2.1
special election to fill
death of contestee prior to certification, territory Governor called special election to fill vacancy caused by; new Delegate-elect seated but finally unseated when determined that predecessor had not been elected at general election, § 2.6
**Wefald v Selvig (Minn.), § 6.1**
**Wickersham v Sulzer (Alaska), § 1.4**
**Wickersham v Sulzer and Grigsby (Alaska), § 2.6**
**Wurzbach v McCloskey (Tex.), § 7.1**

## § 1. Sixty-fifth Congress, 1917–19

### § 1.1 Beakes v Bacon, 2d Congressional District of Michigan.

*Ballots.*—A partial recount unofficially conducted by local election board upon agreement of parties having disclosed error in official returns, parties stipulated that notary conduct complete recount and conceded new results.

*Returns* were partially rejected by the committee on elections based on recount by notary.

Report of Committee on Elections No. 3 submitted by Mr. Walter A. Watson, of Virginia, on Oct. 5, 1917, follows:

Report No. 194

CONTESTED ELECTION CASE, BEAKES V BACON

The record in this case is unique in some respects and is in rather marked contrast with the generality of election cases.

First. No unworthy motive is ascribed to the principals concerned, and intentional wrong is not shown to have been done by any of the officials charged with the conduct of the election.

Second. There is little or no conflict of evidence respecting the material facts in issue, and the only question for decision is one of law and justice as applied to a conceded state of facts.

Third. While the controversy originally embraced the canvass and counting of over 50,000 ballots cast in the election, in the end the issue is narrowed to the proper disposition of the returns from only two precincts.

When it is recalled with what partisan bias contests of this sort have sometimes been wont to be waged in the past, and how frequently your body has had to deal with records of mutual reproach and even crime, the committee deems itself fortunate to be able to say, at the outset, that this contest has, on the whole, been conducted with admirable spirit, and with the desire to elucidate the real merits of the case. Where the electors were so numerous and the ballot complicated, mistakes and irregularities were inevitable and to be anticipated; but the irregularities shown here are mostly formal, and in the aggregate the mistakes comparatively few.

HOW THE CONTEST AROSE

The official returns of the election for Congress, November 7, 1916, gave Bacon 27,182, Beakes 27,133—a majority of 49 for Bacon.

Reviewing the returns from the various precincts, contestant discovered that at first precinct, second ward, city of Jackson, he had run far behind the other candidates of his party, State and Federal; and unaware of any local sentiment or condition to produce such a result, he instituted unofficial inquiries to ascertain the cause. As the returns did not indicate that the contestee had polled any more votes there than the rest of his party ticket, it was obvious that the lost votes had not gone to his competitor. The matter

became the subject of public discussion and of press comment, and a very general impression got abroad that a mistake had been made in the official count. Some of the election inspectors themselves concluded they had made a mistake. And when, two weeks later, the board of county canvassers met to canvass the returns, four of the inspectors who held this election sent to the board a written statement saying that, in compiling the vote for Congress, they had inadvertently failed to include 70 or more votes, and that therefore their return was wrong and did not reflect the true state of that poll.

Contestant, from this disclosure, believing a mistake had been made large enough to affect the result in the whole district, thereupon retained counsel to appear before the board and obtain a correction of the error, or, if this were not possible, a recount of the vote. In these proceedings contestee was likewise represented by counsel.

At this juncture the board, on the application of one of the candidates for the office of coroner, voted for at same election, opened the boxes of this precinct and directed a recount of the ballots. Counsel for both of the parties to this contest being present, they concluded to examine unofficially the vote for Congress as the recount for coroner progressed, and in this way it was ascertained that, as the ballots then stood, the contestant was entitled to 87 votes more than the official returns had given him.

Application was then made to the board on the part of the contestant to correct the error, or award a recount. That a mistake had been made was openly acknowledged by counsel for contestee and conceded by the board (Rec., 50–62); but, deeming its functions to be only ministerial, the board felt unable to correct the returns and found no provision in the statute authorizing itself to hold a recount in case of a Federal office. Application was then made to the State board of canvassers for a recount of the vote, but with like result. The supreme court was then asked for a mandamus, compelling a recount, but refused to award the writ. The laws of his State seeming to afford no remedy for a situation like this, contestant then determined to bring the matter before this House for decision upon its merits. . . . Apparently the State law made no provision for such a proceeding in case of a Federal office; but, by agreement of counsel, the ballot boxes were produced by the clerk before a notary and in this way, first and last, the vote of practically the entire district was recounted—three precincts at the instance of contestant and the rest on behalf of the contestee. This agreement was productive of highly satisfactory results, and has spared your committee an immense amount of difficult and tedious labor.

The sum of the respective concessions stands therefore as follows:

| | |
|---|---|
| Votes conceded to Beakes | 26, 530 |
| Votes conceded to Bacon | 26, 484 |
| Majority for Beakes | 46 |

The foregoing figures cover the entire congressional district except the returns from two precincts—first precinct, second ward, and second precinct,

sixth ward, Jackson city—and they present the only subjects of dispute left in the record.

I

FIRST PRECINCT, SECOND WARD, OF JACKSON CITY

The sole issue raised in regard to this precinct is whether the official returns shall stand, or whether they should be corrected in accordance with the recount.

Contestant contends that, as the return is conceded to be erroneous, they should be set aside and a recount of the ballots had; while contestee insists either that the failure of the election officers in the first instance to seal the ballot boxes properly, or the failure of the clerk thereafter to keep them in safe custody discredited the ballots to such an extent as to make a recount unlawful, and hence that the official return must stand.

So the question is a mixed one of law and fact; but as there is not much conflict of evidence respecting the physical facts in the case, the question, in the last analysis, is one of law.

ERROR IN THE OFFICIAL RETURNS CONCEDED

That a mistake of material size was made in compiling the returns for Congress at this precinct is obvious from the record, and the fact was conceded by everybody who had to deal with the subject in any official or representative way.

The inspectors summoned before the board to see if the error might be corrected, all admitted the error, but not being able to agree, without a recount of the ballots, upon its precise terms; and the board, deeming itself unauthorized to allow a recount, made a separate statement in its certificate to the State board, calling special attention to the situation of this precinct (Rec., pp. 42–43.)

The inaccuracy in the return being conceded by everybody, the only question remaining is whether the ballots in controversy had been so preserved as to justify the recount subsequently made by counsel for both sides, February 22, 1917, before the notary, the result of which is not disputed. (Rec., p. 23.)

*Ballots* remain best evidence and may be recounted where no evidence of tampering with unsealed ballot boxes was found, as State law prescribing sealing of ballot boxes was held directory and not mandatory.

*Ballots,* in ballot boxes improperly commingled between two precincts but counted in the official return, verified that return and were held valid; those in box temporarily misplaced and therefore not included in the official return were conceded void as not properly preserved, but held insufficient grounds for rejection of entire official returns.

Report for contestant, who was seated. Contestee unseated.

SEALING AND CUSTODY OF THE BALLOT BOXES

The only complaint raised on this head relates to the manner in which the boxes were sealed by the inspectors and the custody bestowed upon them by the clerk after they were delivered to his office.

The Michigan statute pertaining to the subject is:

> After the ballots are counted they shall, together with one tally sheet, be placed in the ballot box, which shall be securely sealed in such a manner that it can not be opened without breaking such seal. The ballot box shall then be placed in charge of the township or city clerk, but the keys of said ballot box shall be held by the chairman of the board and the election seal in the hands of one or the other inspectors of election. (See 37, Elec. Laws Mich., revision 1913.)

As to whether this provision regulating the sealing of the ballot box is mandatory or merely directory, there is nothing in the statute to determine.

But statutory provisions regulating the conduct of elections and the preservation of the returns are, after all, only a means to an end, and that end is to secure a true expression of the will of the electors—a free ballot and a fair count. To this end all merely formal legal requirements must bend, and, if the returns are so made and preserved as to furnish satisfactory evidence of the will of the voters, that will must prevail. Upon that proposition, said the Supreme Court of Kansas in the great ease of Guileland *v.* Schuyler (1 Kan., 569), "hangs our experiment in self-government."

The real question to be answered in this ease is not whether the precise form of the statute was observed, but whether the ballots recounted were the identical ballots cast at the election, and if their condition had remained unchanged. If so, their value as evidence is unimpaired, and in the absence of statutory restraint, there can be no legal objection to their being recounted.

From the standpoint of precedent, also, we reach the same conclusions. On several occasions the House of Representatives has found it necessary, in the interest of justice, to set aside official returns and resort to a recount of the ballots.

In the Indiana ease of English *v.* Peele, in the Forty-eighth Congress, an unofficial recount of the ballots was accepted in lieu of the official return for the vote of a whole county; and in the Iowa case of Frederick *v.* Wilson, of the same Congress, a recount was permitted to supersede the official returns from 10 different election precincts.

Having fully considered, as we think, the legal principles applicable to such cases, we may turn now to the facts of this case as disclosed by the record.

*Facts concerning the sealing and custody of the ballot boxes at the first precinct, sixth ward*

It is conceded that when the inspectors finished their work at the election and deposited the ballots in the boxes they locked them properly and sealed them in some manner; that they were delivered to the patrol wagon accompanied by two of the inspectors and delivered promptly by them to the city clerk at his office; that they were placed along with the boxes from other precincts, as they came in, in the outer office or lobby of the clerk's office in front of the clerk's desk through which the public passed during office hours, and where they remained until the next day, until stored away for final keeping in another room under lock and key; that when produced by the clerk before the county board of canvassers on November 23, 1916, and again before the notary on February 22, 1917, they were properly locked, and sealed over the openings left in the tops for the reception of the ballots, but not sealed otherwise; that they could not be opened or their contents removed without being unlocked, but being unlocked they could be opened without breaking any seal; that the total number of ballots in the box corresponded with the number called for by the poll book, and they were all regularly initialed by the inspectors; and that the unused ballots returned therewith were regularly numbered from 704 (inclusive) upward.

In addition to the facts conceded, the clerk testified that the key was delivered to him at the same time as the boxes, and that key and boxes had remained continuously in his possession ever since, except when before the county board and notary, and that he felt sure they had been tampered with in no way. (Rec., 14–15 and 74–75.)

Contestee's brief asserts that there is evidence in the record to show that the boxes, when they left the polling place, were probably sealed over the locks, and advances the theory that these seals were broken after the boxes reached the clerk's office, and hence draws the inference that the ballots had been tampered with. We can find no satisfactory evidence in the record to show that the boxes ever contained any other seals than those which appeared when they were produced before the county board, and therefore can find no warrant for the inference of fraud based upon the assumption that the boxes had before borne a different seal. The theory that the boxes were tampered with after delivery to the clerk seems to us not only most improbable but inconsistent with all the known facts of the case.

Our conclusion, therefore, is that there is no proof or reasonable suspicion of fraud connected with these returns, that they have at all times remained in safe and legal custody, and that their value as evidence was nowise impaired by the failure of the inspectors to seal the boxes in the precise manner required by the statute.

To sum up the whole matter: The official return is conceded by everybody to be wrong; it ought not therefore to be made the basis of title to anybody's seat in Congress. If it can not be corrected, it ought to be rejected entirely. But we think the means are at hand whereby this error may be legally corrected. In the presence of a sworn officer of the law, counsel for both parties recounted these ballots and reached a result which is not in dispute; they

found Bacon had received 352 votes and Beakes 320. We think that recount should stand in place of the original return as the true vote of the first precinct, second ward, city of Jackson.

II

SECOND PRECINCT, SIXTH WARD, CITY OF JACKSON

By official return the total number of electors at this precinct were 577, and the vote for Congress was:

| | |
|---|---|
| Bacon | 211 |
| Beakes | 329 |

The evidence shows a chapter of accidents at this and the third precinct in the same ward, which resulted in the admixture of the ballots of the two precincts in well nigh hopeless confusion, and ultimately created a situation very hard to entangle. It will, therefore, be necessary for a while to consider the returns from these precincts together.

By the returns the electors at the third precinct were 247, and the vote for Congress:

| | |
|---|---|
| Bacon | 93 |
| Beakes | 138 |

There were no irregularities in the conduct of the election at either of these places, nor in the count and canvass of the vote, nor in the sealing and delivery of the ballot boxes (with one exception to be noted presently). No trouble of any kind was experienced with these returns until the attempt was made by the contestee to recount the vote, when great confusion ensued. The trouble arose over an unintentional mixing of the ballot boxes of the two precincts at the time of the election. It must have happened in this way, as was shown by subsequent events:

The ballot boxes for the city were all labeled with the numbers of their respective precincts and wards, but by mistake on election morning one box labeled "third precinct" was delivered at second precinct, and one box labeled "second precinct" was delivered at the third precinct. At the close of the election the canvassed returns at the second precinct were placed in three boxes—two belonging to the precinct and properly labeled, and one, the box labeled "third precinct" already described; while at the third precinct all the ballots were put in the box labeled "second precinct" aforesaid, and delivered to the clerk's office.

The situation was still further complicated by the fact that when the work of the election ended at the second precinct the inspectors failed to return to the clerk's office along with the rest of the returns one of the ballot boxes containing a considerable number of the ballots, and left it in the polling booth uncovered and unlocked (though the polling booth was locked), where it remained until it was discovered by the clerk four months afterward, when he went to prepare for another election. He, of course, covered and locked the box, and carried it to the clerk's office for safe keeping.

ATTEMPTED RECOUNT

So when contestee reached these returns in the prosecution of his recount on March 28, 1917, when the second precinct was called for, the clerk, not knowing of the mixing of the boxes on election day, produced three boxes labeled with the precinct number, one of them being the box he had found open in the polling booth. The place and condition in which this box was found being made known, it was agreed by counsel for both sides that it would be improper to recount the ballots of this precinct as all of them had not been preserved as required by law. (Rec. 169–170.)

A recount was actually made, however, with results widely differing from the official returns from the precinct.

The third precinct being called for the only box labeled with that number was produced, and a recount of its contents disclosed, likewise, large variance from the official return. (Rec., 169–170.)

On April 30 following contestant entered upon his rebuttal testimony, and the inspectors of the two precincts were summoned to explain if they could the discrepancy disclosed between these ballots and their returns. As the ballots were all regularly marked with the initial letters of the inspectors' names, there was no difficulty in identifying the precinct in which they were cast; and in this way it was discovered that of the 535 ballots recounted on March 28 for second precinct returns, only 288 of the number were cast at that poll, and that the residue 247 belonged to the second precinct. Likewise it was found that the 289 ballots recounted at the same time for the third precinct were in fact voted at the second.

The ballots for each precinct having thus been identified, the total number in each was found to correspond with the number called for by the official returns. Hence was reconciled the discrepancy between the ballots and the returns. (Rec., 91–112 )

The former recount of the ballots of the two precincts, while they were commingled, when combined into one whole showed the following results:

| | |
|---|---|
| Total number of electors by official returns ..... | 824 |
| Total number of ballots found in boxes ..... | 824 |
| Total number of votes for Bacon by official returns ..... | 304 |
| Total number of ballots for Bacon found in boxes ..... | 303 |
| Total number of votes for Beakes by official returns ..... | 467 |
| Total number of ballots for Beakes found in boxes ..... | 467 |

—(Rec., 169–170.)

The results, therefore, so far from casting suspicion upon the returns, afforded rather confirmation of their accuracy; and, incidentally, tended to show that the contents of the box left open in the polling place had not been disturbed.

In addition to these facts the unused ballots, numbered consecutively and returned with the ballots from these precincts, were found to show in both instances the number next in order to the last ballot voted.

PRECISE ISSUE AS TO THIS PRECINCT

Both sides agree that they could not have a lawful recount of that portion of the ballots of the second precinct (and being mingled with those of other boxes they could not be separately identified) which were left in the voting booth after the election. And in that view we concur; for, though the ballots bore every internal evidence of not having been disturbed, yet would it be a hazardous experiment and dangerous precedent to permit a recount of returns unsecured and without lawful custody for four months.

Contestant holds the official returns should stand; contestee contends that the failure of the officers to preserve a portion of the ballots, as required by law, so discredits their conduct and official character as to invalidate their whole return, and that it should be set aside in toto; and, that being done, that a recount should be had of the ballots which were properly preserved and they be accepted for the vote of the whole precinct. (It will be remembered that 289 of the 577 ballots cast at the precinct were found in a box labeled "3rd precinct," which has been properly cared for and in which the recount showed Bacon 172, Beakes 111.)

LEGAL PRINCIPLES APPLICABLE TO THE QUESTION

The presumption is that officers of the law charged with the duty of ascertaining and declaring the result [of an election] have discharged that duty faithfully. (McCrary, sec. 459.)

The rule is that the returns must stand until impeached, i.e., until shown to be worthless as evidence, so worthless that the truth cannot be deduced from it. (McCrary, sec. 515. Also Loyd *v.* Sullivan, 9 Mont. 577; and McDuffie *v.* Davidson, Mob., 577.)

The return must stand until such facts are proven as to clearly show it is not true. (Idem, sec. 571; Blair *v.* Barrett, 1 Bart., 308; Knox *v.* Blair, 1 Bart., 521; Washburn *v.* Voorhees, 2 Bart., 54; State *v.* Comrs., 35 Kans., 640.)

Upon these principles our courts have acted from the earliest time, and in contested-election cases Congress has often had occasion to apply them.

The only known fact upon which it is asked to impeach this return is that one of the four ballot boxes in use on election day (for there was a larger box for the reception of ballots during the day in addition to the three in which the returns were placed) was left open in the polling booth by the inspectors after the election, and not delivered to the clerk as required by law. From this single act of omission we are asked to infer a willful violation of the law on the part of the inspectors, and contestee's brief charges it was perpetrated with intent to commit a fraud. Is this so? We are constrained to feel otherwise, and that such harsh conclusion is inconsistent with the other known facts and all the probabilities of the case.

1. There is nothing else in the record reflecting upon the character of any of the officers who held the election. One of them at least had long been a resident of the community. No citizen complained of their conduct during or after the election. There is nothing to show that any one of them had any personal or political interest in the election of the contestant. It is not

known that any of them even voted for him. Indeed it was asserted by counsel in oral argument before the committee (committee hearing) that nearly all the inspectors in the city were Republicans in politics, and the statement was not denied. If this be true, even barring the question of personal character, it is inconceivable they would perpetrate a fraud to elect the Democratic candidate.

2. It is difficult to imagine how it was possible to consummate a fraud by the method chosen in this case. The poll book showing the identity and number of electors and the formal certificate showing the votes for the candidates having been returned to the clerk along with the other ballot boxes, it is not seen how the result could have been affected by anything done to the ballots in the box that was left. The only theory, consistent with crime under the circumstances, would seem to be that the officers had all conspired in advance to frame up a false return, and had retained this box with enough ballots to be altered so as to sustain the return. How this could have been accomplished where the vote was canvassed in public as required by the Michigan law, is not attempted to be explained. But if such a scheme had been executed, surely such wary criminals would have contrived in some way to "deliver the goods," and not have left the highly finished work of their hands exposed to the uncertainties of fortune in a remote corner of the city. With an official ballot in use and no extra ballots obtainable, it is not probable that outsiders could have been expected to aid materially in "doctoring the returns."

3. The facts that the total number of ballots collected from this and three other boxes (one of which was from another precinct) corresponded with the number called for by the poll books; that they were all properly initialed by the inspectors; that the unused ballots returned bore the right serial numbers; and that the vote of the candidates for Congress shown by the ballots was substantially the same as that polled for the other candidates of their respective parties are all strong internal marks to show that no fraud had been practiced upon those returns.

4. The record shows that it was 3 o'clock in the afternoon of the second day before the inspectors finished their work; they had been continuously on duty thirty-odd hours; under such conditions, is it not reasonable to suppose that the box was inadvertently left behind and without thought of wrong?

PRECEDENTS IN THE HOUSE OF REPRESENTATIVES

In the precedents of the House we have found no case in which the official returns have been set aside except for one or more of the following causes:

1. Want of authority in the election board.
2. Fraud in conducting the election.
3. Such irregularities or misconduct as render the result uncertain.

In the Missouri contested-election case of Lindsay *v.* Scott, Thirty-eighth Congress, a case arose resting, we apprehend, upon the same legal grounds as obtain here. An official return was sought to be set aside because of the subsequent destruction of the ballots; but the ballots having been regularly numbered and counted, and the vote entered on the poll book, in the absence

of any other proof of fraud, the Election Committee reported unanimously in favor of the return, and the House sustained the report without a division. (2 Hinds' Precedents, 21.)

In the long line of cases, embracing nearly every variety, adjudicated by the House, we can find no precedent for the contestee's proposal that the official return in this case be set aside, and the portion of the ballots preserved be counted for the vote of the whole precinct. Regarding certificates of election, based on partial returns of an election district—a somewhat analogous question—the House in the case of Niblock *v.* Walls (42d Cong.), rejected a county return because the county canvassers did not include all the precincts in the county.

> If a part of the vote is omitted and the certificate does no more than show the canvass of part of the vote cast * * * it is not even prima facie evidence, because non constat that a canvass of the whole vote would produce the same result. (McCrary, see. 272).

At the precinct in question 577 duly qualified voters participated in the election; 289 of these were so fortunate as to have their ballots properly preserved; 288—the other half—without any fault on their part were so unfortunate as to have their ballots left or to become mixed with others that were left at the polls and not preserved according to law. Under these conditions we know of no principle of law or of morals that would justify us in disfranchising one-half the electors of that precinct and substituting the will of the other half for that of the whole. The very statement of the proposition carries its own reputation.

We find no sufficient cause why the official return from the second precinct, sixth ward of the city of Jackson should be rejected, and are of opinion it should be accepted as a true record of the vote cast for Congress at that poll.

RÉSUMÉ

| | | |
|---|---|---|
| Votes conceded to Beakes (see ante) | 26,530 | |
| Votes awarded Beakes on recount of vote first precinct, second ward, Jackson (see ante) | 320 | |
| Votes accorded Beakes by official returns, second precinct, sixth ward, Jackson (see ante) | 329 | |
| | | 27,179 |
| Votes conceded Bacon (see ante) | 26,484 | |
| Votes accorded Bacon on recount, first precinct, second ward, Jackson (see ante) | 352 | |
| Votes accorded Bacon on official returns, second precinct, sixth ward, Jackson | 211 | |
| | | 27,047 |
| Majority for Beakes | | 132 |

CONCLUSION

For the reasons named, though imperfectly stated, your committee respectfully recommends to the House the adoption of the following resolutions:

1. That Mark R. Bacon was not elected a Representative to this Congress in the second district of the State of Michigan, and is not entitled to retain a seat herein.

2. That Samuel W. Beakes was duly elected a Representative in this Congress for the second district, State of Michigan, and is entitled to a seat herein.

Privileged resolution (H. Res. 195) agreed to by voice vote after brief debate [56 CONG. REC. 246, 65th Cong. 2d Sess., Dec. 12, 1917; H. Jour. 43].

**§ 1.2 Steele v. Scott, 11th Congressional District of Iowa.**

*Ballots.*—Separate partial recounts conducted by parties having resulted in tie vote, the committee on elections conducted a more extensive partial recount of ballots improperly counted by election officials.

Report of Committee on Elections No. 1 submitted by Mr. Riley J. Wilson, of Louisiana, on May 22, 1918, follows:

Report No. 595

CONTESTED ELECTION CASE, STEELE V SCOTT

Upon a canvass of the official returns, certified to it by the various county canvassing boards of the 13 counties composing the eleventh congressional district of Iowa, and the report made by the commissioners appointed to take the vote of the Iowa National Guard, then on the Texas border, the State Board of Canvassers of the State of Iowa found and promulgated the result of the vote cast for Member of Congress from that district at the election held November 7, 1916, as follows:

| | Scott | Steele |
|---|---|---|
| Official returns | 25,947 | 25,796 |
| National Guard vote cast in Texas | 119 | 139 |
| Total | 26,066 | 25,935 |
| Plurality (40)(1) | 131 | |

Upon this result the certificate of election was issued to the contestee.

TESTIMONY

Upon the issues thus made an officer was appointed and agreed upon to receive depositions and take testimony in the State of Iowa.

The contestant in taking his testimony caused a recount to be made of the ballots cast in the second precinct of Sioux City, Woodbury County. The contestee also had a recount of the same ballots. The recount made on behalf of the contestant at this precinct showed a loss for Scott of 111 and a gain for Steele of 108, making a net gain for Steele of 219.

The recount made on behalf of the contestee showed a loss for Scott of 107, and a gain for Steele of 98, making a net gain for Steele of 205.

The contestant then identified and placed in evidence all the official returns in the other and remaining precincts of Woodbury County, and also all the official returns as certified by the various canvassing boards, including the State board of canvassers, in the other 12 counties of the eleventh congressional district, together with the official canvass of the votes cast by the Iowa National Guard on the Texas border.

The condition established at this stage of the proceedings which marked the close of contestant's testimony in chief, may be stated by taking into consideration only contestee's original majority of 131 and the result of the recount made on behalf of both parties at the second precinct of Sioux City, as follows:

| | |
|---|---|
| Contestant's recount at second precinct: | |
| Gain for Steele | 219 |
| Less Scott's original majority | 131 |
| Majority for Steele | 88 |
| Contestee's recount of second precinct:. | |
| Gain for Steele | 205 |
| Less Scott's original majority | 131 |
| Majority for Steele | 74 |

In taking testimony by the contestee a recount was made by both contestant and contestee of the ballots in all the remaining precincts in Woodbury County and also of each and every precinct in the counties of Buena Vista, Clay, Dickinson, and Monona.

The only very striking change from the official canvass shown by this recount was at Nokomis precinct, in Buena Vista County. Here the result was, according to contestee's recount, a loss of 44 for Steele and a gain of 36 for Scott, making a net gain for Scott of 80 votes. According to contestant's recount at the same precinct the result was a loss of 47 for Steele and a gain of 27 for Scott, making a net gain for Scott of 74 votes.

The evidence and hearings disclosed that the contestant and contestee had made a complete recount of 5 of the 13 counties composing the eleventh district, and that no recount had been made by either party as to any of the other 8 counties and that each had tabulated the result of his recount of

these 5 counties with the official returns of the remaining 8 counties which returns had already been identified and offered as evidence by the contestant, and that according to the results thus established the contestant claimed a majority in his favor of 94 votes on his recount, while the contestee claimed, according to his recount and tabulation in the same counties, a majority in his favor of 133 votes.

In the hearings before your committee the argument of counsel for contestant and contestee in respect to the recount centered principally around these two precincts. It was admitted on both sides that conditions had been shown authorizing a recount at each of these precincts, and it was suggested that the committee might settle the contest and reach a correct result and satisfactory conclusion by taking into consideration these two precincts only.

A comparison of the results of the recounts made by the contestant and contestee at these two precincts will serve to illustrate the very difficult and singular position in which your committee found itself in that respect. For instance, taking—

| | |
|---|---|
| Contestant's recount at second precinct, Sioux City, and Nokomis Townships: | |
| Gain for Steele at second precinct | 219 |
| Less Scott's original majority | 131 |
| Majority for Steele | 88 |
| Deduct Scott's net gain at Nokomis | 74 |
| Majority for Steele | 14 |
| Contestee's recount at second precinct, Sioux City, and Nokomis Townships: | |
| Gain for Steele at second precinct | 205 |
| Less Scott's original majority | 131 |
| Majority for Steele | 74 |
| Net gain for Scott at Nokomis | 80 |
| Less majority for Steele at second precinct | 74 |
| Majority for Scott | 6 |
| Now, taking contestant's recount at Nokomis, where contestee gained, and contestee's recount at second precinct, where contestant gained, we have the following result: | |
| Original majority for Scott | 131 |
| Gain at Nokomis on contestant's recount | 74 |
| Majority for Scott | 205 |
| Deduct gain for Steele on contestee's recount of second precinct | 205 |

On this latter comparison the vote would be a tie.

If the entire vote in the district were used in connection with these comparisons the result would be the same.

While, as formerly stated, the result of this recount in the five counties referred to indicated no very striking changes except in the second precinct of Sioux City, Woodbury County, and Nokomis Precinct in Buena Vista

County, yet in other precincts results were found that showed discrepancies from the official returns somewhat unusual. For instance, in the twelfth precinct of Sioux City the contestant lost on recount 36 votes, while in the fourteenth precinct he gained on recount 31 votes. These losses and gains were shown by the recount of each of the parties, the results being undisputed and in fact conceded by both sides. In the recount by the contestant and the contestee of the five counties above referred to there were some 72 precincts in which they failed to agree as to results, that is, as to the number of votes that each had received.

WORK OF THE COMMITTEE

Under the conditions heretofore stated and in view of facts admittedly established by the evidence, your committee did not feel that it would be proper, fair, or just to settle the result of the contest or undertake to do so by recount and consideration only of the two precincts where the principal changes were shown in the recount by the parties to the contest.

It is satisfactorily established by the evidence that the unusual errors shown to have been made by the precinct election officers in counting and returning the votes at a number of precincts in this district were due to and occasioned by the careless and loose method adopted in counting and canvassing the vote, a method entirely at variance with the election laws of the State of Iowa. The Australian ballot law, with its most modern provisions, is the law controlling elections in that State. It has been amended and perfected so as to throw every safeguard around the casting and counting of ballots; but the evidence in this case indicates very clearly that these salutary provisions were not observed at a number of places in canvassing and returning the votes cast at this election. The statement was made before this committee that the method of counting ballots, which in its opinion has caused the chief difficulties here, has practically become a custom at large voting precincts in the State of Iowa, and from which it may be concluded that, while the method is illegal and calculated to lead to incorrect results and in close elections possibly to thwart the will of the majority, no fraud has been intended thereby.

Section 1138 of the Iowa Code provides:

> When the poll is closed the judges shall forthwith and without adjournment canvass the vote and ascertain the result of it, comparing the poll lists and correcting errors therein. Each clerk shall keep a tally list of the count. The canvass shall be public and each candidate shall receive credit for the number of votes counted for him.

There are three judges of election and two clerks at each precinct. Under the provisions of this statute the judges should examine each ballot and the same should be called to the clerks, whose duty it is to keep separately and simultaneously a record of the count. Instead of this, and under the method to which we have referred, it appeared that after the polls had closed the ballots were separated into lots or piles and that one of the judges called

to one of the clerks from one of the piles of ballots while at the same time another of the judges called to the other clerk from another pile of ballots. In this way it is evident that all the judges did not see any one ballot and that no one judge saw all the ballots and that no one clerk recorded or tallied them all. At the close of the count the results were combined. This method is not only irregular but contrary to law.

Although no fraud may be intended by thus disregarding the provisions of the statute, yet in the judgment of your committee proof showing that the law has been so entirely disregarded and in effect violated in the manner of counting and calling ballots, just as effectually opens the door to a recount as though deliberate fraud had actually been proven. (See Frederick *v.* Wilson, Iowa; 48th Cong., Mobley, 401.)

Hence in view of the entire record and evidence, your committee concluded that in so far as a recount was concerned, it could not do less than examine the returns and ballots at each and all of the respective precincts in which there had been disagreement in the recount made by the parties to the contest before the special officer appointed to take testimony in this case.

For the purposes of this recount, it was assumed that the contestant and contestee had accepted the official canvass in the eight counties in which neither had attempted to have a recount during the taking of testimony in Iowa. The official returns of each of said counties had been adopted in showing the vote and results which each claimed to be correct at the close of taking testimony.

It was evident that in the recount made by the contestant and contestee ballots had been rejected pro and con which should have been counted, and which under the laws of Iowa, as construed by its supreme court, were ballots legally cast.

A subcommittee was appointed to make this examination and recount. The work of this subcommittee involved the examination of some 20,000 ballots, after which a report in detail was made to the full committee. It should be said here that absolute harmony prevailed in this work and that the full committee was unanimous in adopting the findings of the subcommittee on the facts. The committee recount of the five counties which had been recounted by contestant and contestee, when taken and tabulated with the official returns of the other eight counties of the district and the National Guard vote, showed the following results:

| | |
|---|---|
| Scott | 26,033 |
| Steele | 26,029 |
| Plurality for Scott | 4 |

*Ballots* irregularly marked by voters for candidates for another office but properly marked for Representative did not contain distinguishing marks violating secrecy and were held valid, as voter intent was clear.

*Pleadings.*—Legal questions presented therein were mooted by committee recount.

Report for contestee, who retained seat.

With very few exceptions the differences as shown by the recount of the contestant and contestee resulted from either including or excluding from the count, by one or the other, ballots which has been marked by placing a cross by the names of the presidential and vice presidential candidates, no squares being placed opposite their names on the ticket, but opposite the names of the presidential electors. In some instances the voter would place an X by the name of the candidate for President and Vice President on the Democratic or Republican ticket as the case might be, and then proceed on down the column and place an X by the name of each presidential elector, and then an X opposite the name of the congressional candidate for whom he desired to vote. In other instances the voter would place an X by the name of the candidate for President and Vice President, then skip the presidential electors and mark the square opposite his choice for Congressman. While this manner of marking the ballots was not strictly in accordance with the provisions of the law, yet, in the judgment of your committee, the intentions of the voters were entirely clear and these votes were counted.

The rejection of these ballots in the former count appeared to have been based upon the belief that the manner of marking the ballots as above set out made them subject to the objection that they contained identifying marks.

It would be difficult to find a clearer and more satisfactory exposition of the Australian ballot law in respect to questions of this character than is contained in the opinion of the Supreme Court of the State of Iowa in the cases of Fullarton *v.* McCaffrey (158 N. W. Rep., 506) and Kelso *v.* Wright (110 Iowa, 560). In the former case the court said:

> The distinguishing mark prohibited by law is one which will enable a person to single out and separate the ballots from others cast at the election. It is something done to the ballot by the elector designedly and for the purpose of indicating who cast it, thereby evading the law insuring the secrecy of the ballot. In order to reject it the court should be able to say, from the appearance of the ballot itself, that the voter likely changed it from its condition when handed him by the judges of election, otherwise than authorized, for the purpose of enabling another to distinguish it from others.

In distinguishing between the former strict construction placed upon the Australian ballot law and the modern view now taken by nearly all the courts, the Iowa court, in its opinion, further says:

> Some of the earlier decisions rendered shortly after the enactment of the Australian ballot law in the several States are somewhat extreme in applying that portion relating to identifying marks, going, as we think, to the verge of infringing on the free exercise of the voting franchise, but these may be explained, if not justified, by the supposed prevalence of corrupt practices at

> elections prior to such enactment and the laudable purpose of efficiently applying the remedy.
>
> Subsequent experience has disclosed how the ordinary voter proceeds under regulations in preparing his ballot, and many of the marks at first denounced as evidencing a corrupt purpose are now thought to be due to carelessness, accident, or inadvertence. What is an identifying mark is not defined in our statute, and whether any mark on a ballot other than the cross authorized to be placed thereon was intended as a means of identifying such ballot must be determined from the consideration of its adaptability for that purpose, its relation to other marks thereon, whether it may have resulted from accident, inadvertence, or carelessness or evidenced designed and the similarity of the ballot with others and the like.
>
> Electors are not presumed to have acted corruptly, and identifications only which may fairly be said to be reasonably suited for such purpose, and likely to have been so intended, will justify the rejection of the ballot.

Applying the law as thus construed, practically all the disputed and -rejected ballots coming under the consideration of the committee in its recount, where the voter had indicated his choice for Congressman, were accordingly counted and credited.

Some very interesting legal questions growing out of this contest were submitted to us which may be stated as follows:

### SHIFTING OF THE BURDEN OF PROOF

It was contended for the contestant that upon the recount of the second precinct of Sioux City and by placing in evidence the official returns from the remaining precincts of Woodbury County, the official returns from the other counties in the district, together with the official count of the National Guard vote, and thus having established a majority in favor of the contestant, the burden of proof then shifted to the contestee to show by competent evidence a majority in his favor, although each and every precinct of the district had been brought in question and the correctness of the official count denied in the notice of contest; while, on the other hand, it was contended on behalf of the contestee that the contestant must make out his case by a recount of the entire district, and that since all the ballots had not been preserved and transmitted to the House of Representatives it was manifest that only a partial recount could be had.

### APPORTIONMENT OF LOST BALLOTS

It was contended on behalf of the contestee that the committee should apportion between him and the contestant in proportion to the number of votes each had actually received 39 ballots proven to have been lost in Spirit Lake precinct, Center Grove Township, Dickinson County, insisting that commit-

tees of Congress had established a rule by which this could be legally done and by which contestee would make a net gain of 13 votes.

THE SOLDIER VOTE

Contestee further contended that the law of 1862, as amended in 1864, under which the vote of the Iowa National Guard on the Texas border was taken and counted, had been repealed by the adoption of the Iowa Codes of 1873 and 1897. The contestant had 20 majority in the National Guard vote.

These legal questions are exceedingly interesting and were presented to the committee with unusual ability, yet in view of the facts that the entire record as presented has been considered, waiving for the purposes of our investigation the question of the burden of proof; that the vote of the Iowa National Guard cast on the Texas border has been counted and is included in the committee recount; that the 39 lost ballots in Dickinson County were eliminated from consideration and not included; and in view of the further fact that notwithstanding this there is still a legal majority of the votes found to be in favor of the contestee, it therefore becomes unnecessary to pass upon these legal questions.

Your committee, for the reasons herein stated, very respectfully recommends to the House of Representatives the adoption of the following resolution:

First. That T. J. Steele was not elected a Representative in this Congress from the eleventh district of the State of Iowa and is not entitled to a seat herein.

Second. That George C. Scott was duly elected a Representative in this Congress from the eleventh district of the State of Iowa and is entitled to retain a seat herein.

Privileged resolution (H. Res. 386) agreed to by voice vote after brief debate [56 CONG. REC. 7354, 65th Cong. 2d Sess., June 4, 1918; H. Jour. 425].

**§ 1.3 Davenport v Chandler, 1st Congressional District of Oklahoma.**

*Elections committee report.*—Instance of summary disposition of resolution reported without accompanying printed report. Seated Member retained seat.

On Jan. 27, 1919, Mr. John N. Tillman, of Arkansas, introduced House Resolution 523 which was referred to the Committee on Elections No. 2. Then, on Feb. 5, 1919, Mr. Tillman called up the resolution as the report of the Committee on Elections No. 2:

*Resolved,* First. That James S. Davenport was not elected to the House of Representatives from the first district of the State of Oklahoma in this Congress and is not entitled to a seat herein.

Second. That T. A. Chandler was duly elected to the House of Representatives from the first district of the State of Oklahoma in this Congress and is entitled to a seat therein.

Reported privileged resolution (H. Res. 523) agreed to by voice vote without debate [57 CONG. REC. 2757, 65th Cong. 3d Sess., Feb. 5, 1919; H. Jour. 152].

**§ 1.4 Wickersham v Sulzer, Territory of Alaska.**

*Ballots* held valid where written by voters, though unavailability of official ballots had not been certified by election officials as required by Territory election law, where evidence showed unavailability of official forms and where law placed no penalty of voter for negligence of officials.

*Territory election law* prescribing form of ballot and permitting written ballots upon official certification of unavailability of required form was construed as directory, thereby overruling federal court order.

*Returns* were improperly rejected in a precinct where officials had failed to sign one of two duplicate certificates of results.

Report of Committee on Elections No. 1 submitted by Mr. Riley J. Wilson, of Louisiana, on Dec. 4, 1918, follows:

Report No. 839

CONTESTED ELECTION CASE, WICKERSHAM V SULZER

The final conclusion of the committee is that the merits of the case are confined to matters involved in:

First. Certain proceedings had before the judge of the United States District Court of Alaska, first divisor.

Second. The legality of the votes cast by native Indians in certain sections of the Territory.

Third. The legality of the votes of soldiers of the United States Army stationed at Fort Gibbon and who voted there, and the votes of other soldiers in the Army who voted at Eagle precinct.

MATTERS INVOLVED IN THE COURT PROCEEDINGS

The subject matter effecting the vital issues in this connection can only be well understood by a full statement of the facts as to how the contest arose.

In the act of Congress of March 7, 1906, making provision for the election of Delegate to the House of Representatives from the Territory of Alaska prescribed generally for election machinery for that purpose. In relation to the form of ballot is found the following provision:

> The voting at said elections shall be by printed or written ballot.

Section 12 provided as follows:

> That the governor, the surveyor general, and the collector of customs for Alaska shall constitute a canvassing board for the Territory of Alaska, to canvass and compile in writing the vote specified in the certificates of election returned to the governor from all the several election precincts as aforesaid.

In 1915 the Territorial Legislature of Alaska passed an act adopting the Australian ballot system for that Territory, providing for an official form of ballot. No change was made as to the Territorial canvassing board. The act of the legislature providing for the Australian ballot system contains an unusual exception as to the use of the official ballots, known as section 21, which reads as follows:

> That in any precinct where the election has been legally called and no official ballots have been received the voters are permitted to write or print their ballots, but the judges of election shall in this event certify to the facts which prevented the use of the official ballots, which certificate must accompany and be made a part of the election returns.

The board whose duty it was to canvass and certify to the result of the election of November 7, 1916, was composed of J. F. A. Strong, governor; Charles E. Davidson, surveyor general; and John F. Pugh, collector of customs. The canvassing of the votes cast at this election was completed March 1, 1917, showing the following result:

| | |
|---|---|
| Charles A. Sulzer | 6,459 |
| James Wickersham | 6,490 |
| Lena Morrow Lewis | 1,346 |
| Plurality for Wickersham | 31 |

Upon the completion of this canvass the said board was preparing to issue certificates in accordance with the result indicated by its canvass and tabulation of the vote. Before any certificate was issued to the Delegate to the House of Representatives, Mr. Sulzer, the contestee herein, presented a petition to Hon. Robert W. Jennings, judge of the United States District Court of Alaska, first division, praying for a writ of mandamus directed to the Territorial canvassing board, commanding said board to reject and not count the vote returned from seven precincts in said Territory, with name and vote cast, as follows: . . . .

In the petition it was charged that the vote at each and all of the abovenamed precincts except Vault and Nizina should be rejected and not counted for the reason that the form of official ballot prescribed by the Territorial legislature had not been used and that no certificate explaining the facts which prevented the use of the official ballots had accompanied the election returns as a part thereof and as required by the laws of Alaska. In other words, that the election officials had not complied with the provisions of section 21 of the act of 1915 in that no official ballots were used at either of the said precincts and no certificates explaining the facts which prevented

the use of the official ballots accompanied the returns. As to Vault precinct, it was charged that no certificate of the result of the election in this precinct specifying the number of votes cast for each candidate accompanied or was included in the returns. At Nizina it was claimed that the judges of election were not sworn. This petition was presented to the court on the 2d day of March, 1917. On the same day Judge Jennings issued an alternative writ of mandamus directed to the canvassing board, and commanding that in the canvass of the vote cast for Delegate for Congress from the Territory the vote at the above-named precincts be rejected and not counted and that the certificate of election be issued to the petitioner, Charles A. Sulzer, as having received the greatest number of votes for that office at said election, and commanding that the board make due returns, and so on.

These answers to the alternative writ of mandamus were filed March 6, 1917. On March 23 the alternative writ of mandamus was made preemptory directing the rejection of the votes cast at each of the above-named precincts, except Nizina, and the issuance of the certificate of election to Mr. Sulzer, the contestee herein. The effect of this judgment was to establish as between the contestant and contestee for Delegate to the House of Representatives the following result:

| | |
|---|---|
| Sulzer | 6,440 |
| Wiekersham | 6,421 |
| Plurality for Sulzer | 19 |

In accordance with this decree, the canvassing board reassembled on March 24 and issued the certificate of election to Mr. Sulzer.

The contest was begun April 10, 1917, and was heard before the committee March 19, 1918.

The thing important in this phase of the case is the proper construction of the Alaska election law, and particularly section 21.

Judge Jennings held the law mandatory, and specifically the proviso in section 21, and that the failure of the judges of election to place with and make as a part of the returns a certificate showing the facts which prevented the use of official ballots vitiated the returns from five of the six precincts named, and ordered the vote thereat rejected and not counted for Delegate to Congress.

Your committee has found itself unable to agree with that construction of the law, and herewith submits the facts and legal considerations which have impelled that conclusion. We readily admit as a general proposition that under the Australian ballot law the provisions requiring the use of an official ballot must be followed, and that no other form of ballot can be used without some special provision of the law authorizing its use.

The statute under consideration authorized the electors in event they were not supplied with official ballots to write or print their ballots, that is, to use a ballot that was not official, and imposed upon the judges of election the duty of certifying to the facts which prevented the use of official ballots.

The conditions in Alaska were such that the Territorial legislature wrote into the law this exception for the use of nonofficial ballots. The question now is to determine whether or not this section of the Alaska election law is mandatory or is it merely directory.

The question of mandatory and directory statutes as applied to elections has been discussed before the House of Representatives more often than any other legal question pertaining to contested-election cases. The precedents indicate that the rulings here have been quite as uniform as in the courts. Each case has some peculiar distinctive features of its own, and after the facts have developed the task becomes one of correct application of the law as established by the many precedents here as well as the decisions of the courts.

The following authorities are submitted as establishing a correct interpretation of the law applicable to the issues in this case:

> Those provisions of a statute which affect the time and place of the election, and the legal qualifications of the electors, are generally of the substance of the election, while those touching the recording and return of the legal votes received and the mode and manner of conducting the mere details of the election are directory. The principle is that irregularities which do not tend to affect results are not to defeat the will of the majority; the will of the majority is to be respected even when irregularly expressed. The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents. (McCrary on Elections, p. 172, sec. 228.)

This doctrine was approved by the House in the case of Arnold *v.* Lee, Twenty-first Congress.

It has been repeatedly held that where the law itself forbids the counting of ballots of certain kinds or forms that do not meet the provisions of the statute, it is mandatory, and that it should be so construed by the courts. This doctrine was approved by the House in the case of Miller *v.* Elliot, Fifty-second Congress, Rowell's Digest, 461. Also in the case of Thrasher *v.* Enloe, Fifty-third Congress, Rowell, page 487.

Where the statute itself provides what the penalty shall be on the failure to comply with its terms, if the law is constitutional, there is no room left for construction. There is no provision of this character in the Alaska election law or pertaining in any way to section 21.

The Supreme Court of Missouri in the case of Horsefall *v.* School District, One hundred and forty-third Missouri Reports, page 542, in passing on a case where the irregularities charged were failure to number the ballots and that the form of the ballots was not as prescribed by the statute, said:

> The decisions of the supreme court in this State have not been altogether harmonious as to the effect of irregularities upon the result of an election, and we shall not attempt to review these cases, but we think that it may now be said to be the established

> rule in this State, as it is generally in other jurisdictions, that when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided or the election will be void. Also if the statute provides specifically that a ballot not in prescribed form shall not be counted, then the provision is mandatory and the courts will enforce it; but if the statute merely provides that certain things shall be done and does not prescribe what results shall follow if these things are not done, then the provision is directory merely, and the final test as to the legality of either the election or the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed, their will. If they have the election will be upheld or the ballot counted, as the case may be.

This decision has been widely quoted and approved and is in our judgment a correct statement of the law and peculiarly applicable to the issues in this case.

We have been cited to numerous authorities, holding that the mandatory or directory character of a statute does not always depend upon its form or the terms used, but rather grows out of the nature of the subject with which it deals, and the legislative intent and purpose in framing and adopting the law. With these authorities we agree, but they can only be applied here in so far as they are applicable to the case under consideration.

As we understand and appreciate the facts and issues in this case the legislative intent is very clear and the purposes and scope of the law easily determined.

The law of Alaska providing for official ballots, in the respect that it contains an exception authorizing the voter to use under certain conditions a ballot of his own make, is in a class by itself.

There are a few statutes directing that in event the regular official ballot is not supplied, certain designated officers may prepare and furnish a ballot in the form prescribed by law. This, then, becomes an official ballot.

Section 21 of the Alaska law says, in the event that the official ballots are not received, "the voters are permitted to write or print their ballots." These are the methods to which they had been accustomed under the congressional act. The ballot prepared by the elector provided for in section 21 is not official, but it is legal. He is doing just what the law says he may do.

The statute imposes certain duties upon the judges of election at each precinct; that is, they receive the official ballots from the United States commissioner, and deliver such ballots to the electors as they appear to vote, and in the event they have no official ballots with which to supply the voters, should they avail themselves of the privilege given to write or print their ballots, then the said officers shall certify to the facts which prevented the use of the official ballots, which certificate must accompany the returns as a part thereof.

The object of this certificate is to furnish an explanation by these officers showing why they had not supplied the electors with the official ballots and had permitted the use of those that were not official.

Now, why should the voter who has done just what the law told him he might do lose his vote because these officials neglected to make out and inclose with the returns a certificate, making the proof that they had not failed in the discharge of the duties imposed upon them. The court held section 21 to be mandatory not only in its requirement that this certificate be made (and we incline to agree with him in so far as the officials were concerned), but to the extent that no proof of its existence could be considered unless it be with and made a part of the returns and that no manner or form of evidence as to the failure to receive the official ballots could save the rejection of the vote.

It is with this latter strict construction we can not agree. Neither do we find anything in the law to authorize the assumption that the legislature intended that innocent voters might forfeit their franchise without any fault of their own or that any man might be deprived of his traditional day in court.

In constructing this statute and arriving at the legislative intent the general situation in Alaska becomes important in many respects. The extent of its territory, and the conditions prevailing in relation to transportation and communication between its various sections are parts of the res gestae. Alaska is in extent of territory one-fifth the size of the United States, thinly populated, and with the exception of a few towns and cities is composed of settlements scattered over its extensive area. There are few railroads and the method of communication to many points is difficult and uncertain. In all this territory at the November election of 1916 only about fifteen thousand (15,000) ballots were cast for the Delegate to the House of Representatives. It is only natural that the legislature in adopting the Australian ballot should take these facts into consideration and in order that all the people in the Territory might have the opportunity to exercise the elective franchise, it being evident in many instances that at precincts in remote sections the official election supplies would not be delivered, enacted the provision, which is such an unusual exception to the Australian ballot law in general.

It was foreseen by the Territorial legislature that it would be necessary, if the electors in many of the outlying precincts were to have the opportunity to vote at all, they should be given the privilege of either writing or printing their ballots, and the legislature's foresight and expectations in that respect are abundantly confirmed by the facts in this ease. This provision was enacted in the interest of the electors in remote places in order to secure for them the exercise of the privilege of voting, and it is not quite possible to believe that in making it the duty of the election judges to certify to the facts which prevented the use of the official ballots it was ever intended that their failure to do so would vitiate the returns and deprive the citizen of the right to have his ballot counted as cast.

According to the record in this ease, there were only eight precincts in the entire Territory where the official ballots were not received in the 1916 election. From five of these there were no certificates accompanying the returns

showing why official ballots were not used. It is not contended that any fraud was committed at any of these precincts, and there is no proof in the record to that effect.

If the result of the election should be determined by the vote at these precincts, why should not a candidate be permitted to submit proof to a court or to the House of Representatives showing the facts as to the presence or want of presence of the official ballots? In the judgment of your committee, such a right existed. We are further of the opinion that the record satisfactorily establishes the feet that official ballots were not received at the precincts in question and that the proof is made by legal and competent evidence.

It is contended that this conclusion could not be reached without considering ex parte affidavits, private letters, telegrams, and incompetent hearsay. It is true that there is much private correspondence by letter and wire and a number of ex parte affidavits in this record which are not evidence, and which have no place here, and have not been considered by the committee in reaching its conclusion.

It is important, therefore, to state the facts established by legal proof upon which we reached the conclusion that the required official ballots were not supplied.

. . . [I]n the judgment of your committee, from the established facts and circumstances surrounding the voting at the Bristol Bay precincts, the inference is clear and satisfactory that the official ballots were not received by the judges of election in the Bristol Bay district. These facts and circumstances may be stated as follows:

First. It was the duty of the judges of election to receive the official ballots and to supply the electors with them as they appeared to vote. This duty is imposed upon them by law, and the presumption is that they would have discharged that duty. If the official ballots were there it is not probable that all the voters and all the officials in this district would have used and permitted the use of nonofficial ballots.

Second. Other official election supplies, being the official register and tally book, were used by the judges of election at each of the precincts, and these supplies were the same at the precincts where the majority was for Sulzer as at precincts where the vote went for Wickersham.

Third. No reason or any cause of any character is shown or suggested why the election officials or voters in this remote locality should have declined to use the official ballots with the names of the parties for whom they desired to vote printed thereon and instead prepare with pencil, typewriter, and other means the ballots which they cast. What reason could be given, for instance, for those who desired to vote for Mr. Wickersham declining to use ballots upon which his name was printed and taking ballots upon which the name of Mr. Sulzer was printed and going to the trouble to write Wickersham's name thereon in order to vote for him. It would not be safe or correct to assume, without proof, that there was a conspiracy or a general understanding to prevent the use of official ballots in this section of the Territory.

In our judgment, a careful study of this record will preclude to any unbiased mind the belief that official ballots were supplied at any of these precincts, and it is not surprising that the election returns sent from this isolated and remote section should be found wanting in some formality. It is true the required certificate did not accompany the returns from all the precincts, but this statute places no penalty upon the voter on account of the absence of that certificate.

This is undoubtedly just such a case as the Legislature of Alaska had in view when this exception, authorizing the voters to write or print their ballots, was enacted as a part of the laws of that Territory. Had it been the intention of the legislature to vitiate the returns in the absence of this certificate as a part thereof, and to thus deprive the voter of his ballot without any fault of his own, the statute would have so provided.

THE NOME DIVISION

The two precincts here where the required certificate did not accompany the returns are Utica and Deering.

A certified copy of the certificate . . . made by the clerk of the United States District Court of Alaska, second division, reads as follows:

> We, the undersigned judges of election held November 7, 1916, at Utica voting precinct in the Fairhaven recording district, hereby certify that at the time of said election there had been no ballots received, and Mr. Ketner, of Deering, had the form of ballots telephoned from Candle and repeated it to Utica, and we wrote the ballots, using the form as we received it.

The officials at this time were endeavoring to get the true facts about the election and to supply the deficiency in returns. There certainly could have been no design in making the statement contained in the above certificate. When the committee examined the original returns from Utica and Deering it was found that the ballots at Utica were written with lead pencil and conformed in all respects with the official ballot. The ballots used at Deering were in the same form and prepared with typewriter. It is not probable that the election judges at these two precincts, without having received any information as to the form and contents of the official ballot, which was quite lengthy, could have prepared ballots substantially in that form and containing the information as to the candidates and subjects that were printed on the official ballots. The one conclusion is that the information contained in this certificate is correct. The certificate is under the seal of the clerk of the district court, the officer with which such certificate should be filed, and therefore legal evidence. Had these officials at Utica and Deering received the official ballots, it is inconceivable that they would have made with pencil and typewriter ballots in the same form for the use of the voter.

The evidence satisfactorily establishes the fact that no official ballots were received at either Utica or Deering precincts. Of course, under the view taken by the court, this evidence could not be considered, although it be of the most convincing character, but under the view taken by the committee

it has been considered here, and in view of this evidence and our appreciation of the law, the votes at Choggiung, Nushagak, Bonafield, Utica, and Deering should not have been rejected.

VAULT PRECINCT

The vote at this precinct was rejected because the judges of election had failed to sign the certificate in the back of the register and tally book. This same book showed that the judges of election were duly sworn and that they compiled the count and tallied the vote and complied with all other formalities except the signing of this certificate, which was sent to the Territorial canvassing board. It was also the duty of the judges of election to send a duplicate certificate, showing the result of the election to the clerk of the court of that division, and undisputed evidence shows that the original duplicate certificate, dated November 7, 1916, was filed with the clerk of the court and signed by all the judges, and that a certified copy of that certificate, made by the clerk of the court, had been sent to and was in the possession of the canvassing board. It is conceded that considerable argument might be made in favor of the reasons for rejecting the votes at the other precincts, but it is very difficult to find any support in law for throwing out the vote at Vault. The certified copy of the certificate, showing the vote at this precinct, was before the canvassing board and the information conveyed to the court that the certificate was before the board. This certificate was under the seal of the public officer, made by law the legal custodian of that document. The copy of this certificate is found on page 146 of the printed record. The committee holds that the vote at the Vault precinct should not have been rejected.

*Suffrage.*—Indians born in Territory and severed from tribe are permitted to vote as citizens; ballots cast by nonresidents of precinct or Territory are invalid, as are ballots cast by military personnel involuntarily stationed in the Territory.

*Evidence.*—All ballots cast by Indians were validated for lack of sufficient proof showing specific voters not qualified.

*Returns* were rejected by proportional deduction method where there was no evidence for whom unqualified voters had cast ballots.

Report for contestant, who was seated. Contestee unseated.

Under the law of Alaska every native Indian, born within the limits of the Territory, who has severed his tribal relationship and adopted the habits of civilized life becomes a citizen and is entitled to vote. The law provides methods by which he may obtain evidence showing that he has met with the requirements of the law, but this is not compulsory, leaving the matter a question of fact peculiar to the individual case.

From the indefinite, conflicting, and unsatisfactory character of the evidence in this case it is not practical or possible to say whether or not the election officers were within the law in receiving or rejecting the votes of Indians who voted or would have voted at this election. With very few excep-

tions, the evidence is of a general nature, and with respect to many there is no evidence at all. The evidence fails to disclose any intention or attempt to commit fraud at either of the precincts in question and where the Indians voted. The election officers have particular knowledge of the conditions and the people in the locality surrounding precincts where they preside, and it is their duty to know that each voter is duly qualified before permitting him to deposit a ballot. These officers are presumed to have discharged this duty. The evidence shows very clearly that many of the Indians were entitled to vote. The Indian vote is mingled with that of other citizens, and the record points out no intelligent way by which it may be ascertained that any injury is actually proved to have resulted to either candidate on account of the Indian vote. It is probable that a portion of this vote is illegal, but the action of election officers charged with the duty of conducting elections should not be set aside except upon definite proof, and the votes once received by such officers should not be rejected unless the proof establishes in some definite way that the voters were not qualified and the number and identity of votes that should not be counted, and especially is this true in the absence of proof of any conspiracy to commit fraud.

The testimony shows that they were qualified electors under the laws of Alaska, and each on being examined as a witness states that he appeared in person and offered to vote and that he would have voted for Sulzer, and the committee is of the opinion that their votes should be so counted. (Printed record 335 and 338.)

While not connected with this or the other main features of the case, are the votes of Louis Klopsch, who was not a resident of the precinct in which he voted, and Julius Forsman, of foreign birth, unnaturalized, both of whom, according to direct and undisputed testimony, voted for Wickersham. These votes should not have been received or counted, and are accordingly deducted from contestant's vote. (Printed record 240 and 261.)

The result of the findings in these two instances is a gain for Sulzer of 2 and a loss for Wickersham of 2, or a net gain for Sulzer of 4 votes.

SOLDIER VOTE

The evidence shows conclusively that 36 soldiers in the United States Army, stationed in Alaska, voted in this election—4 at Eagle and 32 at Fort Gibbon. Apparently there is no difference or controversy as to the facts in relation to these soldiers, except in respect to their right to vote at these precincts in Alaska. Hence, the question is purely of a legal nature. The facts may be stated as follows: . . .

Seven were honorably discharged and reenlisted in Alaska on the following day.

Each and all of them had been in the Territory more than a year immediately preceding the date of election and at Eagle or Fort Gibbon more than 30 days immediately preceding election day.

If they had acquired a legal domicile in Alaska, they were entitled to vote and the votes should be counted; otherwise not.

To become a citizen and a qualified elector in Alaska, a bona fide residence of one year in the Territory and 30 days in the voting precinct is required.

The question of domicile or place of residence of those in the military service of the country, either as officers or as men in the line, has been before Congress and in the courts in a number of cases, but not of very recent date so far as Congress is concerned. The subject is one of great importance and absorbing interest just at this time, not only in this case and in Alaska, but throughout the country.

The soldier has an interest in knowing what construction is going to be placed upon the law affecting his domicile with its civil and political rights and privileges during his absence in the service of the country, while, on the other hand, the public is equally concerned as to the conditions under which a new domicile or residence may be acquired by those in the military service and stationed at many places in the several States.

Hence a very careful examination of the authorities bearing upon this question has been made, and we submit as a correct statement of the law the following:

> (1) In the case of an officer or enlisted man in the Military Establishment, held that his domicile during his continuance in the service is the domicile or residence which he had when he received his appointment as an officer or entered into an enlistment contract with the United States. This is true whether such a domicile was original—that is, established by nativity—or by residence with the requisite intention, or derivative, as that of a wife, minor, or dependent. This residence or domicile does not change while the officer remains in the military service, as his movements as an officer are due to military orders; and his residence, so long as it results from the operation of such orders, is constrained, a form of residence that works no change in domicile.
>
> (I.A.) A person in the military service of the United States is entitled to vote where he has his legal residence, provided he has the qualifications prescribed by the laws of the State. He does not lose such residence by reason of being absent in the service of the United States. The laws of a particular State in which he is stationed and has only a temporary as distinguished from a legal residence may, however, permit him to vote in that State after a certain period of actual residence.
>
> (Digest of Opinions of the Judge Advocates General of the Army. Howland. Pages 976, 977, 978.)

Also from McCrary on Elections, page 70, sections 90 and 91:

> Sec. 90. The feet that an elector is a soldier in the Army of the United States does not disqualify him from voting at his place of residence, but he cannot acquire a residence, so as to qualify him as a voter, by being stationed at a military post whilst in the service of the United States.

> Sec. 91. Soldiers in the United States Army cannot acquire a residence by being long quartered in a particular place, and though upon being discharged from the service they remain in the place where they have previously been quartered, if a year's residence in that place is required as a qualification for voting, they must remain there one year from the date of discharge before acquiring the right to vote.

See also, Hinds' Precedents, volume 2, pages 70 and 71; section 876 Taylor v. Reading, Forty-first Congress.

Also Report of Judiciary Committee of Senate in the case of Adelbert Ames, Senator from Mississippi—Compilation of Senate Election Cases, 375.

Applying this law to the facts here, the 36 soldiers stationed in Alaska who voted at Eagle and Fort Gibbon were without legal domicile there and were not in any legal sense inhabitants of the Territory, and therefore were not qualified electors therein.

It is contended, however, that these soldiers had changed their residence from the States where they enlisted to Alaska and had acquired domicile there. The evidence in support of this is that they appeared on election day, and upon their votes being challenged, took the required oath containing the declaration of residence and voted.

Now in keeping with what was apparently the view held by some of these officials, in the argument for the contestee, the contention is made that the residence or domicile of a soldier is determined by his intention; that (quoting from brief) "these soldiers have already shown their purpose and have established their residence in Alaska."

This argument seems to be based upon the assumption that the soldier or officer in the military service sent under orders away from the State of his original domicile and stationed in another State, while subject to the orders of his superiors, can have and exercise voluntarily and in his own right the requisite intention necessary to effect a change in domicile and that, after being so stationed for the statutory period required for voting, a declaration of choice of domicile accompanied by the act of voting constitutes sufficient evidence that the change has been effected.

Without stopping to discuss the public policy of approving here and establishing a rule of this kind, it is sufficient to say that the law and authorities are in practical harmony and are all the other way.

So under the laws of Alaska, as in all the States in so far as the committee is informed, a person to be a qualified elector must, in legal acceptation, be an inhabitant.

Manifestly no one can become an inhabitant in Alaska or in any of the States (at least without some provision of the law authorizing) who does not initiate and continue his residence there voluntarily, on his own motion and in his own right.

At Eagle and Fort Gibbon, where the 36 votes, which the committee have found illegal, were cast, a total of 92 votes were polled, as follows:

| | Sulzer | Wickersham |
|---|---|---|
| Eagle | 33 | 13 |
| Ft. Gibbon | 37 | 9 |
| Total | 70 | 22 |

It is not definitely shown for whom these voters cast their ballots, with the exception of eight voting at Fort Gibbon, seven of whom testified they vote for Sulzer and one for Wickersham.

Of the remainder, in order to save the votes legally cast and avoid discarding the entire poll at these precincts, a pro rata deduction should be made in accordance with the rule established in the case of Finley *v.* Walls, Forty-fourth Congress (Smith, 373, McCrary, sec. 495, p. 364), where the principle upon which the rule is founded is thus stated:

> In purging the polls of illegal votes the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division and not from the candidate having the largest number. Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote for each.

With a deduction made on this basis, and according to the testimony of the eight who disclosed for whom they voted, the total result at these two precincts would then stand:

> Sulzer, 42; Wickersham, 14; being a loss of 28 for Sulzer and 8 for Wickersham, or a net loss for Sulzer of 20.

Readjusting the entire vote in accordance with the findings and conclusions of the committee, the result finally established is:

| | |
|---|---|
| Wickersham | 6,480 |
| Sulzer | 6,433 |
| Plurality for Wickersham | 47 |

CONCLUSION

Wickersham had a plurality of the vote as returned and canvassed. There has been no serious dispute about this fact.

The certificate of election which was about to issue to him upon the completion of the canvass was withheld and awarded to the contestee by a judgment of the court based upon a construction of the law with which your committee could not agree, and which was not in keeping with the precedents established by the House of Representatives.

For the reasons assigned, your committee recommends to the House the option of the following resolutions:

1. That Charles A. Sulzer was not elected a Delegate to the House of Representatives from the Territory of Alaska in this Congress, and is not entitled to retain a seat herein.

2. That James Wickersham was duly elected a Delegate to the House of Representatives from the Territory of Alaska in this Congress, and is entitled to a seat herein.

Privileged resolution (H. Res. 492) agreed to (229 yeas to 64 nays with 13 "present") after debate on Jan. 3, 4, and 7, 1919, and after rejection of motion by Mr. John L. Burnett, of Alabama (131 yeas to 187 nays with 1 "present") to recommit the contest to the Committee on Elections No. 1 with instructions to report thereon by or before Feb. 10, 1919 [57 CONG. REC. 1059, 1106, 65th Cong. 3d Sess., Jan. 7, 1919; H. Jour. 53, 55].

**§ 1.5 Gerling v Dunn, 38th Congressional District of New York.**

*Notice of contests,* although found insufficient for lack of particular specifications, did not prevent decision by committee on election on merits of contest.

*Ballots.*—Committee on elections refused to consider allegations that state statutes governing arrangement of machines violated the state constitution.

*Evidence.*—Contestant failed to offer sufficient proof of fraud by officials or irregulatories in use of machines.

Report for contestee, who retained seat.

Report of Committee on Elections No. 1 submitted by Mr. Riley J. Wilson, of Louisiana, on Feb. 17, 1919, follows:

Report No. 1074

CONTESTED ELECTION CASE, GERLING V DUNN

The result of the election of November 7, 1916, in the district, as shown by the official returns and as between the contestant and contestee, was as follows:

| | |
|---|---|
| Thomas B. Dunn | 29,894 |
| Jacob Gerling | 13,867 |
| Majority for Dunn | 16,027 |

The grounds upon which the contest is based, as set forth in the petition of the contestant, are substantially that the election held in the thirty-eight congressional district of New York on November 7, 1916, was illegal and unconstitutional for the reasons that—

First. The voting machines used at said election did not comply with the requirements of the election law of the State of New York and that they

were not legal machines as defined by the statutes of that State and were not so arranged for use in voting as required by the New York election laws.

Second. That certain provisions of the constitution of the State of New York had been violated in the manner and method of conducting the election by the use of such voting machines and also by the enactment of a special law by the Legislature of New York State designed especially for Monroe County, under which law this election was conducted.

Third. That the voting machines used at this election were prepared and arranged by an expert and not by the proper legally constituted authorities, and that such machines were not properly tested before use at this election.

Fourth. That the machines used at this election did not provide a secret method of voting as provided by the New York State constitution.

The contestant does not allege that he was elected or that the contestee did not receive a majority of the votes cast, the contention being that the election was illegal and void.

The notice of contest is faulty and defective in the respect that the allegations are vague, indefinite, and general. However, the committee considered the merits of the case.

Practically all the grounds upon which the contest is based relate to matters of policy that should be addressed to the consideration of the legislative department of the State government, or to questions proper to be determined and adjudicated by the courts of New York State and not by Congress.

It has not been and should never be the policy of the House of Representatives to pass upon the validity of State laws under which elections are held when the complaint is that the legislative enactment is contrary to the provisions of the State constitution.

### VOTING MACHINES

Congress has authorized the use of voting machines in the States.

On February 14, 1899, section 27, Revised Statutes of 1878, was amended and reenacted to read as follows:

> All votes for Representatives in Congress must be by written or printed ballot or voting machine, the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effcet.

Voting machines have been in use in New York State for many years, authorized by its constitution, provided for by its legislature, and sanctioned by its courts.

The evidence in this case fails to support by definite proof any of the charges made against the machines used at this election or to disclose any fraudulent or illegal action on the part of any official connected with the conduct of the election, or the canvass, tabulation, and return of the vote.

RESOLUTION

Your committee therefore recommends to the House the adoption of the following resolution:

> That Thomas B. Dunn was duly elected a Representative in this Congress from the thirty-eighth congressional district of the State of New York and is entitled to retain a seat herein.

Reported privileged resolution (H. Res. 585) agreed to by voice vote and without debate [57 CONG. REC. 3578, 65th Cong. 3d Sess., Feb. 17, 1919; H. Jour. 199].

**§ 1.6 Britt v Weaver, 10th Congressional District of North Carolina.**

*State election law* requiring "X" marking of ballots by voters was construed as mandatory and applicable to written ballots containing a single name, by committee on elections minority and by the House (overruling majority committee report declaring contestee elected by validating written unmarked ballots).

Report of Committee on Elections No. 3 submitted by Mr. Walter A. Watson, of Virginia, on Feb. 21, 1919, follows.

Report No. 1115

CONTESTED ELECTION CASE, BRITT V WEAVER

The official returns of the election held on November 7, 1916, as ascertained and judicially determined by the canvassing boards of the respective counties of the district and by the State board of canvassers, showed the following result:

| | |
|---|---|
| Weaver | 18,023 |
| Britt | 18,014 |
| Majority | 9 |

Contestant's claim is that the official returns, properly ascertained and determined, should have shown the following result:

| | |
|---|---|
| Britt | 18,008 |
| Weaver | 17,995 |
| Majority | 13 |

QUESTION AT ISSUE

The question at issue is one of law, and in the view of the committee it is decisive of the merits of the case. Its decision rests upon the disposition to be made of certain ballots cast by voters at the election and not marked

in accordance with the directions of the State law. The question arose in this way:

The canvassing board of Buncombe County attempted and did include as a part of the official vote ascertained some 33 of such unmarked ballots (27 of which were counted for Weaver and 6 for Britt), thereby making the vote of that county 4,353 for Weaver and 4,043 for Britt, instead of 4,325 for Weaver and 4,037 for Britt as contestant claimed it should have been. Against this action of the board contestant protested and instituted mandamus proceedings in the superior court of the State to compel the board to exclude the aforesaid ballots from the official count. The court held that, under State law, the board of canvassers possessed not only ministerial, but judicial, functions in determining election returns, and that hence it had no power to review its discretion, or to compel by mandamus its exercise in any particular way. From this judgment contestant appealed and after exhaustive argument the supreme court of the State sustained the opinion of the court below, and thereupon the State board of canvassers directed the certificate of election to be issued to the contestee. Thus the contestant sought and obtained the adjudication of the State courts upon the legal questions involved, so far as those tribunals felt they had jurisdiction to determine them in the proceedings brought.

### THE UNMARKED BALLOT

The Australian ballot was not in use in North Carolina. The law governing general elections as it stood prior to 1915 required that "ballots shall be on white paper and may be printed or written, or partly written and partly printed, and shall be without device," that the size of the ballot should be prescribed by the State board of elections; that separate ballots and separate boxes should be used for the various Federal, State, and local offices, and that the ballots should be given out to the voters at the polls and each voter might deposit his own ballot if he chose. No account had to be kept of the number of ballots issued to the voters, and after the canvass by the election officers, which had to be in public view, the ballots voted were not made a part of the returns or required to be preserved in any way.

Such were the general provisions of the law in so far as they affected the ballot at a general election prior to 1915. In that year the State undertook to legalize its primary elections, and in section 32 of the act inadvertently, as is manifest from the context and its subsequent repeal, incorporated the following provision:

> That opposite the name of each candidate on the general ticket to be voted at the general election shall be a small square, and the vote for any candidate shall be indicated by marking a cross mark, thus (X), in the square, and no voter shall vote for more than one candidate for any office. But there shall also be a large circle opposite the names of each party's candidate on each ticket, and printed instructions on said ticket that a vote in such large circle shall be a vote for each and all of the candidates of the various officers of the particular party, the names of whose can-

> didates are opposite said circle, and if a voter in a general election indicates by a cross in such large circle his purpose to vote the straight and entire ticket of any party, his vote shall be counted for all the candidates of such party for the offices for which they are candidates, respectively, as indicated on such ticket.

This was the only reference to the subject in the whole act, and the provision was obviously intended to apply to a general ticket of some sort containing the names of several candidates among which the voter could indicate his choice by making the cross mark. But the act prescribed no such ballot for use in the general election; on the contrary, the congressional ballot in this election was separate and distinct for each political party, and each ballot contained but a single name; it would seem, therefore, the said provision could have had no application to a ballot of this kind, and that the deposit of a ballot with a single name would indicate the voter's choice beyond peradventure of doubt. . . .

Now, the evidence in the record shows that some 90 electors, presumably qualified, cast their ballots in the election without making a cross mark in the square opposite the candidate's name. Did their failure to do so invalidate their ballots? Your committee thinks not.

LAW OF THE CASE

Assuming that the statute intended to apply to a ballot with a single name, which it seems to us would be without reason and against common sense, the next question is whether such provision is mandatory, or merely directory. If mandatory, the failure of the voter to comply would invalidate the ballot; if only directory, his failure to follow legal forms in preparing his ballot, provided he made his intention plain, would not deprive him of his vote. The object of all election laws is to ascertain the will of the majority; and when ascertained the will of the majority should prevail, even though it be sometimes irregularly expressed.

It is hard to lay down any precise rule of construction so as to determine in every ease what provisions of a statute are mandatory and which directory; but it is easy to gather from the legal text writers and from court decision what the general principle is applicable to the case in hand.

Judge Cooley's rule:

> Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. (Constitutional limitations, p. 113, and the following cases from State courts: Odiorne *v.* Rand, 59 N. H., 504; Pond *v.* Negus, 3 Mass., 230; Holland *v.* Osgood,

> 8 Vt., 276; Colt *v.* Eves, 12 Conn., 243; People *v.* Hartwell, 12 Mich., 508; Edmonds *v.* James, 13 Tex., 52; People *v.* Tompkins, 64 N. Y., 53; State *v.* Balti. Comrs., 29 Md., 516; Fry *v.* Booth, 19 Ohio, 25; Slayton *v.* Halings, 7 Ind., 144.)

And relative to the construction of election laws in particular, the same author says:

> Every ballot should be complete in itself and ought not to require extrinsic evidence to enable the election officers to determine the voter's intention Perfect certainty, however, is not required in these cases. It is sufficient if an examination leaves no reasonable doubt upon the intention, and technical accuracy is not required in any case. The cardinal rule is to give effect to the intention of the voter, wherever it is not left in uncertainty, act. . . . A great constitutional privilege—the highest under the Government—is not to be taken away on a mere technicality, but the most liberal intendment should be made in support of the elector's action wherever the application of the common-sense rules which are applied in other cases will enable us to understand and render it effective. (Item, pp. 914 and 920.)

McCrary, some time a representative from Iowa and a leading authority on election cases, laid down this rule:

> The language of the statute construed must be consulted and followed. If the statute expressly declares any part of an act to be essential to the validity of the election, or that its omission shall render an election void, all courts whose duty it is to enforce such statutes must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done, within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election. . . . The principle is that irregularities which do not tend to affect the results, are not to defeat the will of the majority; the will of the majority is to be respected even when irregularly expressed. (McCrary on Elections, pp. 93 and 94; and see to the same effect, Tucker *v.* Com. 20 Penn. St. R. 493).

"Where the intention of the voter is clear the ballot will not be rejected for faulty marking by the voter, unless a law undoubtedly mandatory so prescribes," was the rule formulated by Mr. McCall, of Massachusetts, in a very able report from the Elections Committee and adopted by the House of Rep-

resentatives in the Fifty-fourth Congress. (See Yost *v.* Tucker, 2 Hinds' Prec., sec. 1077).

"Where the intention of the voter was not in doubt the House followed the rule of the Kentucky court and declined to reject a ballot because not marked strictly within the square required by the State ballot law." (Syllabus 2 Hinds' Prec., sec. 1121, in case of Moss *v.* Rhea, 57 Cong.).

In many cases the House has counted ballots rejected by the election officers under an erroneous construction of the law, and reference may be made particularly to the case of Sessinghaus *v.* Frost in the Forty-seventh Congress where this course was pursued. (2 Hinds' Prec., sec. 975.)

The Supreme Court of North Carolina in construing the very statute under review said:

> If the matter was properly before us and we had jurisdiction to decide it, we would hold as to the congressional ticket, which has only one name on it, that all unmarked ballots ought to be counted for the respective candidates, because the purpose of the election is to ascertain the will of the voter, and the marking of the ballot can only serve a useful purpose in ascertaining this will when there are more names than one upon the ballot. (See Britt *v.* Board of Canvassers, 172 N. C., p. 797.)

Applying the foregoing principles then to the question at issue, we have these facts before us:

The statute nowhere else declares it to be mandatory to mark the ballot in the square, nor pronounces the ballot invalid if not so marked; the marking could serve no purpose in indicating the will of the elector where only one name appeared, as his intention was manifest upon the face of the ballot itself; and lastly the marking of the ballot under such circumstances could not, by any stretch of the imagination, be deemed of the essence of the election or to affect its validity in any way.

For these reasons, therefore, we have no hesitancy in holding that section 32 of the North Carolina primary law of 1915 was not mandatory; but that its provisions were directory only, and that the failure of the voter to comply therewith did not invalidate his ballot. All the unmarked ballots properly cast at the election should have been counted, and it was a mistake of law for the election officers to have excluded them from their official returns.

. . . [I]t appears that there were 90 unmarked ballots voted at the election, 43 of which already appear in the returns, leaving a balance of 47 not counted by the election officers and which ought to go, 26 to Weaver and 21 to Britt. Adding these figures to the totals for the candidates already returned we have the true state of the poll as follows:

| | |
|---|---|
| Weaver, official returns (less 2 deducted as aforementioned),18,021, plus 26 unmarked ballots not counted ..... | 18,047 |
| Britt, official returns, 18,014, plus 21 unmarked ballots not counted ..... | 18,035 |
| Majority for Weaver ..... | 12 |

The above result we believe to be based upon clear and satisfactory proof. We are not unmindful that there is some evidence tending to show there was an unmarked ballot at Leicester precinct for contestant not counted, probably 2 at Hazel for the contestee more than he is credited with above, and a few such ballots at Peachtree not counted nor ascertained who for; but the evidence in these cases is either conflicting or insufficient and the number of ballots involved not sufficient to change the result, and we therefore excluded them from consideration.

QUANTITY AND CHARACTER OF EVIDENCE

The ballots not being preserved in North Carolina after being canvassed, and a recount therefore being impracticable, the committee has accepted none but clear and convincing testimony as to the number and contents of these unmarked ballots. Fortunately the record discloses very little dispute among the witnesses on the subject. Most of the testimony presented is from the election officers representing both political parties who were called by the contestant himself. It may be said, therefore, that the facts adduced relative to the unmarked ballots rests mainly upon contestant's evidence, which is practically uncontradicted. The ballots in the controversy and embraced in the above count were all found in the congressional boxes, kept by bipartisan election officers against whom fraud in this respect has neither been charged nor proven, and there is the same presumption of their having been cast by qualified electors as exists in favor of the other ballots which came out of the same box.

The following minority views were submitted by Mr. Cassius C. Dowell, of Iowa; Mr. Fiorello H. LaGuardia, of New York; and Mr. Everett Sanders, of Indiana:

Report No. 1115, Part 2

After a careful study of the statutes of the State of North Carolina and a thorough search of adjudications and the history of election legislation, we find that these so-called amended and supplemental returns have no legal status. These alleged returns were conceived and used by the board in a desperate attempt to prevent contestant, Mr. Britt, from receiving the election certificate, which the record shows he was clearly and legally entitled to receive.

And these pretended returns did, in fact, become the basis upon which Mr. Weaver now is a sitting Member in this House.

In other words, the so-called amended and supplemental returns were used by the canvassing board for the purpose of overcoming the 13 majority which contestant Britt had received in the district.

It is clear under the law that these alleged amended and supplemental returns were not, in fact, amended or supplemental returns, and could not legally form a part of a basis for certificate of election.

It is, therefore, apparent that the certificate of election should have been issued to contestant J. J. Britt, and that he was legally entitled to same.

It is apparent from the above statement that the original returns gave contestant Britt a majority of 13 votes. The question then presented to the committee and to the House is whether or not the evidence in this case is sufficient to overcome such original returns.

Under the precedents of the House, when it appears that contestant (Britt) had the majority of the votes according to the original returns, the burden of proof then devolves upon the contestee (Weaver) to show that he received a majority of the votes cast at the election.

The law of North Carolina at the time of the election, relating to the manner of marking the ballot, was as follows:

> That opposite the name of each candidate on the general ticket to be voted at the general election shall be a small square, and a vote for any candidate shall be indicated by making a cross mark thus (X) in such square, and no voter shall vote for more than one candidate for any office; but there shall also be a large circle opposite the names of each party's candidates on each ticket and printed instructions on said ticket that a vote in such large circle will be a vote for each and all of the candidates for the various offices of the political party the names of whose candidates are opposite said large circle; and if a voter at the general election indicates by a cross mark in such large circle his purpose to vote the straight or entire ticket of any particular party, his vote shall be counted for all the candidates of such party for the offices for which they are candidates, respectively, as indicated on such ticket.

The language of the above provision of the North Carolina statute is clear, concise, and unequivocal. It is subject to one interpretation, it wit, that a ballot must be marked. It is similar to the provisions of the election laws of nearly every State in the Union, and its purpose is to guard against the very thing which happened in this case, that while the ballot is made plain and easy in order that everyone, regardless of his education, may have an equal opportunity to understand it and vote according to his desires, yet it requires some affirmative act on the part of the voter to express his intention. This act was to place a cross mark in the square in front of the name of the candidate the voter desires to vote for.

The contestee, Mr. Weaver, contends that in a number of precincts throughout the district, ballots bearing his name were voted without the voter placing the cross in the square in front of his name on the ballot, and that these ballots should be counted for him; and that by counting these unmarked ballots he received a majority of the votes cast at the election.

The minority of your committee believe that the law of North Carolina, providing for the manner of voting and the manner of marking the ballot is mandatory, and that the ballot should have been marked as provided by this statute, in order to become a legal ballot. This is the general rule laid down by the courts in construing similar statutes. And it is our opinion that the unmarked ballots should not be counted.

We call attention to a few of the cases bearing upon this question.

> Where the law provides that the voter shall indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names or in case he desires to vote for all the candidates of the party, etc.; Held, that this provision is mandatory; the stamping of the square being the only method prescribed by which the voter can indicate his choice. (Parvin *v.* Wirnberg (Ind.), 30 N. E. 790.)

From the opinion of the court in this case, on page 791, we quote:

> The doctrine that it is within the power of the legislature to prescribe the manner of holding general elections, and to prescribe the mode in which the electors shall express their choice, is too familiar to call for the citation of authority. In this instance it has declared that the mode by which the elector shall express his choice shall be by stamping certain designated squares on the ballot. There is nothing unreasonable in the requirement, and it is simple and easily understood. Furthermore, if he is illiterate or is in doubt, the law makes ample provision for his aid. If he does not choose to indicate his choice in the manner prescribed by law, he can not complain if his ballot is not counted. (Kirk *v.* Rhoads, 46 Cal. 399.) If we hold this statute to be directory only and not mandatory, we are left entirely without any fixed rule by which the officers of election are to be guided in counting the ballots.

Under a statute similar to the North Carolina statute, it was held that a ballot on which the names of candidates were written in, but no cross mark made after any of the names, can not be counted for any candidate. (Riley *v.* Traynor (Col.), 140 Pac. 469.)

After quoting the statute, the court, on page 470 says:

> There can be no mistaking this language. It requires that in order to designate his choice, the voter must use a cross mark, as the law requires. In this case, no cross mark was used anywhere with reference to any of the candidates for the particular office in question, and the ballots ought not to have been counted.

Under a similar statute requiring the voter to make a cross designating his choice of candidates, it has been held that a failure to comply with this requirement invalidates the ballot. (See Vallier *v.* Brakke (S. Dak.), 64 N. W. 180, at 184.)

> The law has prescribed the manner in which an elector may arrange his ticket, and what act he may do to designate the candidates for whom he desires to vote. His act must correspond with his intention, and unless it does the vote can not be counted. The system devised is so simple that a man of sufficient intelligence to know what a circle is, how to make a cross, and left from right, can find no difficulty in making up the ticket he desires to vote. He can have no difficulty in expressing his intention in the man-

> ner the law has prescribed. It is not necessary, therefore, to impose upon judges of election or courts the duty of ascertaining the intention of the voter, except in the manner pointed out by the statute, namely, by the marks he has placed upon the ballot in the manner prescribed by law.

Following this construction of the law, there can be no other conclusion but that Contestant Britt was elected and is entitled to his seat.

*Evidence* of ballots cast by unqualified voters and of voters improperly disqualified, which had been rejected by committee majority as insufficient or hearsay, was relied upon by minority to establish contestant as elected despite counting of written unmarked ballots.

Majority report for contestee, who was unseated. Minority report for contestant, who was seated.

OTHER IRREGULARITIES

But for the unmarked ballots there would have been no contest in this case. They caused the dispute before the Buncombe County canvassing board; they were the subject of litigation in the State courts; they were the burden of the argument before the committee; and, in our view, they are the heart of this whole controversy. But the contest once begun and issue joined, after the manner of ancient lawyers, each side brought blanket charges against the other, alleging other irregularities in the conduct of the election. Contestant claims that 156 individuals voted for his opponent who were disqualified by reason of nonage, or nonresidence, or nonpayment of poll tax, or intimidation, or bribery, or crime, or insanity; and on his part contestee contends that 200 voters disqualified for similar reasons were allowed to vote for contestant. Contestant further claims that 21 qualified voters offering to vote for him were denied the right to cast their ballots.

Amid the pressure of other duties and with the time at its command it would be a physical impossibility for the committee to trace out the details of each of these near 400 cases, each depending for solution upon its own state of facts, and it has been able to investigate carefully only a limited number of them. The testimony relating to these questions is in most cases hearsay, inconclusive, and often conflicting. Especially is this true when it comes to proof of how the alleged disqualified voters cast their ballots. Unless the voter himself waives the secrecy which protects his ballot, sound public policy would seem to forbid the reception of any evidence of the subject.

However, as far as we have been able to pursue the inquiry concerning these alleged illegal voters, we have found that, upon the whole, the election officers conducted the election with general impartiality and in good faith. They represented both political parties, were upon the ground, had knowledge both of individuals and local conditions; and with the witnesses and public records before them they were in a situation to pass satisfactorily upon the various questions of nonage, nonresidence, poll taxes, etc., which arose before them. Being laymen for the most part and sometimes unlet-

tered men, they occasionally made mistakes of law; but we have failed to find the number either large or very important, and these mistakes, such as they were, seem to us to have fallen about equally on both sides. In the absence of fraud or palpable mistake, we would not feel justified in going behind the election returns to review the judgment of officials exercised in good faith upon questions of fact they were as competent to determine as ourselves.

No facts disclosed by the record would, in our judgment, warrant the House in undertaking now to hold the election over again, and to pass anew upon the variant qualifications of several hundred individual voters.

This seems to have been the general view of the contestant himself, at least as to a greater part of the district, when, appearing in his own behalf before this committee, he said:

> I ask further that you determine as to the 12 counties of the district other than Buncombe County the acts of the returning boards in these counties on November 9 were without grounds sufficient under our laws and practice to warrant a review, etc. (Committee hearing, p. 98.)

BALLOTS IN WRONG BOX

Among other irregularities complained of by contestee was the fact that two ballots properly marked for him and found in a wrong box at Logan's Store precinct were rejected by the judges and not counted for him, while ballots similarly misplaced, were counted for contestant at other precincts. While the general rule of law undoubtedly is to count ballots placed in the wrong box by mistake, in North Carolina this question, under the statute, is left to the decision of the election officers; and their decision of the question, once made, ought not it seems to us to be subject to review.

> Any ballot found in the wrong box shall not be counted, unless the registrar and judges of election shall be satisfied that the same was placed there by mistake. (See section 4347, N.C. election law.)

CONCLUSION

For the foregoing reasons the committee recommends to the House the following:

*Resolved:*

First: That James J. Britt was not elected a Member of this Congress.

Second: That Zebulon Weaver was elected a Member of this Congress and is entitled to his seat.

On this issue the minority report stated:

The minority, however, desire to make it clear to the House that the evidence shows that Mr. Britt was elected, if the unmarked ballots are counted.

If, in counting the unmarked ballots, all the testimony in the record is considered, contestant, Mr. Britt, has a clear majority of the votes cast at this election.

Applying the ordinary rules laid down in contested-election cases with reference to ballots, which your minority believe must be applied, Contestant Britt has a much larger majority. . . .

The majority report disposes of this issue as follows:

> Being laymen for the most part and sometimes unlettered men, they [referring to the boards] occasionally made mistakes of law; but we have failed to find the number either large or very important, and these mistakes, such as they were, seemed to us to have fallen about equally on both sides.

The minority dissent from this conclusion. On the contrary, an analysis of the evidence in respect to these votes does not show that the list is not large nor unimportant. Neither does it show that they have fallen about equally on both sides.

The minority find the number of illegal votes cast for Contestee Weaver exceed any number that could possibly be claimed to have been cast for Contestant Britt and that the excess is 24 votes, not including the votes hereinbefore specifically referred to. . . .

After thoroughly considering the record in this case, and after carefully reviewing the evidence, we feel confident that contestant, Mr. Britt, has been clearly elected, and by a majority of not less than 43 votes, even if the unmarked ballots should be counted.

The undersigned minority, therefore, respectfully recommend the adoption of the following resolutions:

> *Resolved,* That Zebulon Weaver was not elected a Representative in the Sixty-fifth Congress from the tenth congressional district of North Carolina, and is not entitled to retain his seat therein.
>
> *Resolved,* That James J. Britt was duly elected a Representative in the Sixty-fifth Congress from the tenth congressional district of North Carolina, and is entitled to a seat therein.

The above resolutions were offered as a substitute to the majority resolution.

Mr. Watson called up the privileged resolution recommended by the committee majority, on which debate was extended to five hours and equally divided between Mr. Watson and Mr. Dowell by unanimous consent. The substitute amendment offered by Mr. Dowell declaring contestee not elected and not entitled to retain a seat and declaring contestant elected and entitled to a seat was agreed to by 182 yeas to 177 nays, which vote was then reconsidered by 180 yeas to 177 nays. The substitute amendment was then again agreed to by 185 yeas to 183 nays with 6 "present." The resolution as thus

amended was agreed to (185 yeas to 182 nays with 6 "present"), and the motion to reconsider that vote was held not in order by the House, thereby overruling the decision of the Chair by 173 yeas to 182 nays. [57 CONG. REC. 4777, 65th Cong. 3d Sess., Mar. 1, 1919; H. Jour. 272–277.]

## § 2. Sixty-sixth Congress, 1919–21

### § 2.1 Tague v Fitzgerald, 10th Congressional District of Massachusetts.

*Ballots,* disputed at state recount or during taking of evidence, were examined and recounted by the committee on elections upon adoption by the House of a resolution authorizing subpena of ballots and election officials.

*Ballots,* containing write-in or sticker votes for contestant but absent the corresponding crossmark required by state law, were held valid, thereby overruling decision of state officials, where voter intent was clear.

On Sept. 4, 1919, Mr. Frederick R. Lehlbach, of New Jersey, by direction of the Committee on Elections No. 2 obtained unanimous consent for the immediate consideration of the following resolution (H. Res. 280):

*Resolved,* That M. W. Burlen, Edward P. Murphy, Frederick J. Finnegan and Jacob Wasserman, the members of the board of election commissioners of the city of Boston, or any successor of them in said office, be, and they are hereby, ordered to be and appear before Elections Committee No. 2 of the House of Representatives forthwith, then and there to testify before said committee or such commission as shall be appointed touching such matters then to be inquired of by said committee in the contested-election case of Peter F. Tague against John F. Fitzgerald, now before said committee for investigation and report and that the members of the board of election commissioners of the city of Boston bring with them all such ballots and packages of ballots cast in every precinct in the said tenth congressional district of Massachusetts at the general election held in said district on the 5th day of November, 1918, as were described as challenged, disputed, or contested ballots, either at the recount of the ballots cast at said general election conducted by said board of election commissioners of the city of Boston, or at the taking of depositions before notaries public in this case; also, all ballots received from absent soldiers and sailors and not counted; that said ballots be examined and counted by or under the authority of such committee on elections in said case; and to that end that proper subpoenas be issued to the Sergeant at Arms of this House, commanding him to summon said members of the board of election commissioners of the city of Boston, or any successor in office of either of them to appear with such ballots as witnesses in said case; that service of said subpoenas shall be deemed sufficient, if

made by registered letter, and such service shall be so made unless otherwise directed by said Committee on Elections No. 2; and that the expenses of said witnesses and all other expenses under this resolution be paid out of the contingent fund of the House; and that said committee be, and hereby is, empowered to send for all other persons and papers as it may find necessary for the proper determination of said controversy; and also be, and it is, empowered to select a subcommittee to take the evidence and count said ballots or votes, and report same to the Committee on Elections No. 2 under such regulations as shall be prescribed for that purpose; and that the aforesaid expenses be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by said Elections Committee No. 2, and when approved by the Committee on Accounts—was considered and agreed to.

House Resolution 280 was agreed to by voice vote without debate [H. Jour. 425, 66th Cong. 1st Sess.].

Report of Committee on Elections No. 2 submitted by Mr. Louis B. Goodall, of Maine, on Oct. 13, 1919, follows:

Report No. 375

CONTESTED ELECTION CASE, TAGUE V FITZGERALD

Your Committee on Elections No. 2, having had under consideration the contested election case of Peter F. Tague *v.* John F. Fitzgerald, tenth congressional district of Massachusetts, and having completed its investigation and consideration of same, herewith submits its report to the House of Representatives.

Contestant and contestee were candidates for the Democratic nomination for Member of Congress in the primaries in the September preceding the election. Contestee, on the face of the returns, was declared to have received the nomination, whereupon contestant instituted proceedings to have this result reversed, first before the board of election commissioners of the city of Boston and subsequently before the ballot-law commission of the State of Massachusetts. The validity of contestee's nomination was eventually upheld, but the decision was rendered a few days before election day, too late for contestant to file an independent petition whereby his name could be printed upon the ballots to be used in the general election. The method of voting in Massachusetts is by the voter making a cross after the name of the candidate of his choice where it appears on the ballot. Where the name of the voter's choice is not printed on the ballot, he is permitted to write the name thereon or affix thereto a sticker bearing the name of his choice and then marking a cross after the name thus written or affixed. All votes cast for contestant in the election necessarily were of this character. On the face of the returns contestee was declared elected by a plurality of 238 votes in a total number of 15,293 votes cast for Member of Congress in the entire congressional district.

One thousand three hundred and four ballots cast in said election were disputed. Your committee carefully examined each of said disputed ballots

and where possible gave to them such effect as from their examination was obviously the intent of the voter casting the same, within such limitations, however, as the common law and the statutes of the State of Massachusetts prescribe. A large number of such ballots had affixed to them stickers bearing the words "Peter F. Tague for Congress" or had the name of Peter F. Tague written thereon without, however, a cross thereafter. No other candidate for Congress was voted for on such ballots. In the absence of a provision expressly rendering such a ballot void in the Massachusetts statute and in the absence of a reported case on that point in this State, the committee held that the intention of the voter to vote for Peter F. Tague was manifest by affixing a sticker or writing the name, notwithstanding that the act had not been completed by the making of a cross thereafter, and counted such vote for Tague. Various other changes in specific cases from the determination of the local canvassers were made, the committee acting, except in the above set forth instance, with practical unanimity. After such reexamination of the ballots, the committee found the plurality of contestee to be 10 without passing upon the validity of 14 ballots challenged at the polls, all for contestee, and 6 soldier votes received in the office of the secretary of state of Massachusetts on days subsequent to the day of election, of which 5 were for contestee and one for contestant.

It is but just to state that in its review of these ballots the committee found the work of the board of election commissioners of the city of Boston to be fair, impartial, and accurate, the difference in its determinations and those of the committee being substantially due to the feet that the Boston commission was guided by an opinion of the attorney general of Massachusetts rendered some 20 years ago, which your committee was unwilling to give the force of law in the absence of judicial support.

On Oct. 18, 1919, the following minority views to accompany House Report 375 were, by unanimous consent, filed by Mr. James W. Overstreet, of Georgia, and Mr. John B. Johnston, of New York:

The contestant, Mr. Tague, in our opinion utterly failed to carry the burden he assumed in the contest. He failed to prove the allegations made in his case. Mr. Fitzgerald was elected on the face of the returns and has a certificate of election from the governor of Massachusetts and the governor's council. And he, of course, is entitled to his seat, unless the contestant can show to the contrary.

When a Member of Congress is charged with the duty of passing upon the title of the office of one of his colleagues he assumes a delicate and solemn responsibility. Wholesale charges of fraud, intimidation, bribery, and coercion were made by the contestant and his counsel, and these charges were in no instance supported by proof.

The contestant alleged that several hundred ballots were cast for him with stickers having his name thereon without a cross opposite his name, and contended that if these ballots were counted for him there would be more than enough of such ballots to change the result of the election. The

committee sent for, and had brought before it, all of the contested ballots and examined them carefully one by one,

Every ballot having a sticker with the name of Peter F. Tague without a cross was counted for the contestant, although contrary to the law of the State of Massachusetts. Every ballot having the name of John F. Tague, William H. Tague, or even Tague written on it With pencil or ink and without a cross was counted for the contestant. He was given the benefit of every doubt in counting the contested ballots. . . .

If certain ballots that were counted for Mr. Fitzgerald, or thrown out by the commissioners and afterward counted for Mr. Tague by our committee, could have changed the result by electing Mr. Tague, then the committee would be justified by congressional precedent. But the most liberal count of the ballots by the committee failed to change the result.

As the case stood after an examination of the ballots after which the committee gave Mr. Tague everything he claimed, contestee had a plurality of 10 votes, not counting challenged votes or soldiers' votes that came in late, which, if counted, would have given contestee a plurality of 25. To overcome these 10 votes so that contestant could win, it was only necessary to prove 11 cases of illegal registration.

*Returns,* totally rejected in precincts where one-third of voters therein were fraudulently registered, where other frauds were committed by party workers for contestee, and where contestee failed to prove that remaining qualified voters had voted for him, established a majority for contestant.

*Returns* in precincts containing fraudulently registered voters were totally rejected rather than by proportional deduction method, where an elections committee majority considered the frauds more prevalent than those proven and where illegal votes were not cast pro rata between parties.

*Registration.*—Numerous incidents of merchants' and municipal employees' fraudulently claiming domicile in certain precincts in order to participate in local elections were held sufficient grounds for rejection of entire returns from such precincts, though insufficient to justify declaration of vacancy.

Majority report for contestant, who was seated upon unseating of contestee. Minority views recommending declaration of vacancy and separate minority views for contestee.

The majority report continues:

Contestant, among the reasons in his notice of contest, charges the following:

> E. In ward 5 the large vote which was cast for you was composed in great part of those who had been colonized in said ward for the purpose of manipulation by the political organization of

said ward, which colonization and illegal registration and illegal voting was contrary to the State and Federal law.

Various other charges of frauds and irregularities at the general election are made by the contestant. He also charges gross frauds and irregularities in the conduct of the primary election, including the charge of colonization and illegal registration. As these other charges were not determining factors in the committee's conclusions, save as they may have corroborative and cumulative effect with regard to the charge E, your committee refrains from discussing them in this report except as they are incidentally referred to below.

Your committee, after careful and exhaustive scrutiny of the oral testimony taken in the ease and the exhibits filed therewith, finds and reports the following facts.

The laws of the State of Massachusetts do not provide for an annual personal registration of voters. Names appearing on the registry list are carried subject to the check of a canvass made by police officers on the 1st day of April of each year. Information not under oath furnished the police on this occasion by a member of a household or by an employee of a hotel or lodging house is sufficient to retain a name on the registry list. Holders of liquor licenses must be residents of the locality in which the license permits them to do business. Municipal employees must be residents of the municipality upon whose pay roll they are. There were a large number of licensed liquor places in the fifth ward of Boston. The existence of these licenses depended upon the city of Boston voting wet in the local-option elections. Because of the necessity of license holders being residents of the city of Boston and because of the desirability of the employees of these places voting in the Boston local-option election in order to insure the continuance of their employment, such liquor dealers, bartenders, waiters, and porters whose homes, in fact, were elsewhere took advantage of the laxity of the registration laws by causing their names to be placed upon the registry lists of the fifth ward, retaining the same year after year by the expedient of spending a few nights at some address in the ward on or about the 1st of April and voting in the primaries and on election day and incidentally in the local-option election in the fifth ward of Boston. The same state of facts obtains with regard to municipal employees, particularly with regard to those who obtained their appointments through Martin M. Lomasney, the acknowledged political leader of the fifth ward. This state of affairs is particularly prevalent in precincts, 4, 8, and 9 of said ward. There also are located in these three precincts 28 hotels or lodging houses. From these places 230 votes were cast, 153 of which came from seven lodging houses.

Your committee finds and reports that large numbers of names of persons were handed in to the police by the clerks of these lodging houses as being domiciled there, who, in fact, were not such residents and of whom, subsequently, no trace could be found.

Your committee finds and reports that the total vote cast for all candidates for Congress in the fourth, eighth, and ninth precincts of the fifth ward was 906. As a result of an investigation a list of 316 names of persons

who had voted in the election in these three districts was compiled, who prima facie evidence indicated were fraudulently upon the registry list. These were summoned to appear and testify before the notaries public taking testimony under the authority of and by the direction of Congress. Service of these summons was intrusted to the United States marshal of the judicial district and his deputies. Of this number 188 could not be found, either at the addresses from which they voted or elsewhere. Seventy-seven upon whom process had been duly served refused to appear. Of the remainder who appeared and by their testimony sought to justify the legality of their vote, a large majority were not in fact domiciled at their voting address, but had families elsewhere with whom they actually made their homes, and their pretensions to a residence in these precincts of ward 5, upon which they could legally predicate the right to vote there, were the flimsiest subterfuge. In addition to this testimony, in 28 of the cases of alleged fraudulent registrants who refused to obey the congressional process, the testimony of women who knew these men and their families proved their nonresidence at the addresses voted from.

Your committee finds and reports that fully one-third of the total number of votes cast in the fourth, eighth, and ninth precincts of the fifth ward of Boston were fraudulent.

Your committee further finds and reports that Martin M. Lomasney is the political boss of the fifth ward; that he is nominally a Democrat but that when it suits his personal ends he has no hesitancy in wielding his power to encompass the defeat of Democratic candidates; that he and his lieutenants work through an organization located in the fifth ward, known as the Hendricks Club; that he has built up his power through a number of years largely by means of the fraudulent votes of the liquor dealers, bartenders, and city job holders illegally registered in his ward and the padded returns of alleged residents in the cheap lodging houses. Lomasney admits that he used the full powers of his organization and resources to defeat contestant.

As an example of the methods employed, your committee refers to the fact that at the primary election the names of a number of young men who were absent from Boston in the military or naval service of the country were voted on, among these being the son of the president of the Hendricks Club and the son of the secretary of that organization. In each ease where the name of the son was thus fraudulently voted on, the father was in charge of and present at the polling place at which such vote was east.

Your committee further points out that one of the workers on behalf of the contestee, subsequent to the selection, admitted to a friend of contestant that he had caused to be prepared and distributed stickers with no gum attached, in order that the person seeking to vote for Tague would be thwarted in this by the falling off of the sticker after the ballot had been deposited in the box. Such a sticker without gum was produced in evidence, but there was in fact no direct evidence produced showing the distribution at the polls of such ungummed stickers by workers for the contestee. In corroboration of the admission of the supporter of contestee, however, your committee found on 10 ballots crosses after a blank space, with evidence that the paper in

said blank space had been moistened, apparently in an endeavor to affix something thereto.

That Lomasney exercised in this election control over large numbers of these illegal registrants is demonstrated by the following incident. Process under authority of ballot-law commissioners of Massachusetts had been served on a large number of alleged fraudulent voters in the investigation of the primary election. They refused to appear. The commission intimated that their absence might militate against the eontestee. Lomasney thereupon appeared in the court room at the head of some 45 alleged witnesses. He admitted when testifying in the congressional investigation that he had ordered these witnesses produced. He refused to render like assistance to Congress. Questions as to his ability and willingness to assist Congress in the production of evidence sought under its authority in conformity with the procedure prescribed by it in statutes were excluded by the notary public, Mancowitz, who functioned on behalf of contestee. In this the notary grossly exceeded his authority. His performance during the hearing presents a curious admixture of ignorance and impudence. The attitude of Lomasney, Mancowitz, and certain others present at the congressional proceedings on behalf of contestee was one of defiance of the authority of Congress and resentment at its interference in what they deemed their local affairs.

In the face of all this evidence contestee contents himself with a bare denial and produces no testimony to refute it.

Mr. Robert Luce, of Massachusetts, submitted minority views to accompany the committee report. Those views provided in part:

In the present case it was shown that illegal registration had also taken place in the wards carried by Mr. Tague, and although no attempt was made to prove it existed there to such an extent as in the wards carried by Mr. Fitzgerald, there was nothing to indicate that even if it were possible to prove in specific instances for whom illegal votes were cast, it would be shown that no considerable number of such votes were cast for Mr. Tague.

2. Mr. Tague had been twice elected to Congress under the same conditions as those of which he now complains. In each instance he sought and accepted the support of Martin M. Lomasney, a ward leader whom he now charges with being responsible for the frauds alleged. As a candidate for a third term, he again sought the support of Mr. Lomasney, and only when that was refused did he show any objection whatever to the methods by which he had profited and with which he was thoroughly familiar. For many years it has been common knowledge in Boston that many men whose real homes are in the suburbs, make an annual pretense of living in the locality here concerned, for financial, political, or social reasons. It has also been commonly known that men in unreasonably large numbers have been registered from lodging houses, with the effect of making impersonation easy, inasmuch as repeaters can vote on the names of such men with little fear of detection. Mr. Tague took no offense at this state of affairs while it accrued to his advantage. He then made no request to the election commissioners that lists should be purged. He employed no investigators, no challengers. He did not assume it to be a part of good citizenship to lay the facts

before the legislature and suggest a remedy. He acquiesced in what he now declares to be fraud, because that was then to his benefit. It is a cardinal principle of justice that he who seeks equity must come into court with clean hands. A man may not profit by fraud both coming and going. Mr. Tague is estopped by his previous acquiescence.

Mr. Overstreet and Mr. Johnston contended in their minority views:

There is not one case of illegal registration conclusively proven. There was no proof of one illegal vote cast for Mr. Fitzgerald. There has not been a single name stricken from ward 5 voting list on Mr. Tague's charges; in fact, recent information discloses that the voting list this year just completed shows 280 more voters registered in ward 5 than a year ago when this election took place.

The majority of the committee bases its decision on the unsupported testimony of contestant, which was the result of information received from canvassers, and clearly inadmissible in any court of law, and never before was received before a congressional committee.

The contestant in his brief practically admitted that he had not proved his allegation of illegal registration. He claims, however, that because his unsubstantiated allegations were not answered by the persons involved he is excused from proving them. This position is unsound for the reasons:

First. The burden of proof is on the contestant.

Second. There is a presumption that the certified voting lists are correct and in compliance with the law.

Contestant attacks the right of many persons to vote where listed and registered in this district, claiming that they have no legal domicile there.

Every man must have a domicile. It is undisputed that he has a right to choose his domicile. In the ease of men having several homes, they have the right to choose any one of them as their domicile. In the ease of men moving from place to place, it is clearly their right to choose their domicile, and the question of domicile is a question of intent. . . .

Ward 5 comprises nearly the entire business section of Boston, with its great hotels, docks, and wharves, great banks and warehouses, the two great railroad terminals of Boston, the statehouse, post office, customhouse, city hall, and the county courts. It has a highly diversified population in which are represented all of the European countries, as well as the native Yankee. There are many small hotels and lodging houses. There are a great many places where men only live for a short while, and move from place to place. There are many unfortunate men who are compelled by force of circumstances to live in these cheap places, but who have the right to a domicile and the right to vote. These men can not be disfranchised because they happen to live in a different house or on a different street at election time than they did at the time they were listed by the police.

In Boston, men, in order to vote at election, must be listed where they reside the first week of April. If they are so listed they have the right to vote

from such residence if qualified and later registered. (See sec. 14, chap. 835, acts of 1914.)

All of the witnesses stated that they were listed and registered in ward 5 where they lived and nowhere else. Now, if these men live there intending that it shall be their domicile, they can not be listed elsewhere, and without listing they would not be entitled to vote elsewhere, and would therefore be disfranchised.

Here is the law on this matter:

> See. 69. In Boston there shall be a listing board composed of the police commissioner of said city and one member of the board of election commissioners.
>
> Sec. 70. The listing board shall, within the first seven week days of April in each year, by itself or by police officers subject to the jurisdiction of the police commissioner, visit every building in said city, and after diligent inquiry make true lists, arranged by streets, wards, and voting precincts, and containing as nearly as the board can ascertain, the name, age, occupation, and residence on the first day of April in the current year, and the residence on the first day of April in the preceding year, of every male person twenty years of age or upwards, who is not a pauper in a public institution, residing in said city. Said board shall designate in such lists all buildings used as residences by such male persons in their order on the street where they are located, by giving the number or other definite description of every such building so that it can be readily identified, and shall place opposite the number or other description of every such building the name, age, and occupation of every such male person residing therein on the first day of April in the current year, and his residence on the first day of April in the preceding year.
>
> The board shall place in the lists made by it, opposite the name of every such male person or woman voter, the name of the inmate, owner or occupant of the building, or the name and residence of any other person, who gives the information relating to such male person or woman voter. (Chap. 835. Listing and Registration of Voters in Boston.)

As shown above in the statute the name of the informant must be given to the police, so that this evidence was available to show whether or not these men were bona fide residents.

Under this system in ward five, the police listed over 22,000 male persons on the 1st of April 1918, six months before the election, and at a time when Mr. Tague and Mr. Lomasney's relations were most friendly, as shown by Mr. Tague's letter to Mr. Lomasney, which appears in the evidence, under date of March 28, 1918, in which he asked him to send him the name of a contractor whom he could use to get in on contracts to build some of the cantonments, yet but 4,800 of these 22,000 possible voters were registered on election day in November. Could any stronger answer be made to Mr. Tague's charge of colonization?

It is also worthy of note that an examination of the voting lists in the three precincts to be thrown out shows that the large majority of the voters to be disfranchised were on the voting list all the time that Mr. Tague was in Congress, and were known as his supporters, in fact were respongible for hie first nomination. This does not look like colonization to defeat Mr. Tague.

In order to decide that there was illegal registration so as to invalidate any of the contestee's votes, it must be shown either that the men charged were acting in conjunction with the contestee or his friends in fraudulent registration or that the informant or landlord were doing the same. This was not shown in any case.

Having failed to properly prove this, the contestant, over contestee's objection, read a prepared list of the names of persons alleged to be the same persons registered in ward 5, and alleged to be residents of other districts in other parts of the city, or in Boston suburbs.

This evidence was gathered by investigators, whose names the contestant would not divulge, and which was not sworn to. He refused to allow contestee's counsel to examine the reports from which he was reading. . . .

Examination with a microscope by experts did not furnish any evidence to substantiate the charge that stickers lacking gum were distributed. The fact that dot a single voter testified to having received a sticker without gum on it made it seem to some of the committee at any rate extremely improbable that the distribution of such stickers was general, if indeed it took place at all.

The majority report concluded:

Having found the facts to be as above set forth, it remained for your committee to apply such remedy as would do justice and would conform to the law.

Early in the history of congressional contested-election cases, the doctrine was developed that where precincts or districts were so tainted with fraud and irregularity that a true count of the votes honestly cast was impossible, such precincts or districts must be rejected and the parties to the contest may prove aliunde and receive the benefit of the votes honestly cast for them. As early as the Fourteenth Congress, 1815–1817, in the case of Easton *v.* Scott (Rowell's Digest, 68); the committee unanimously recommended that the alleged return from the precinct of Cote Sans Dessein be rejected and submitted resolutions declaring petitioner entitled to the seat. This report was recommitted to the committee with instructions to receive evidence that persons voting for their candidate were not entitled to vote on the election. Apparently the recommendation of the committee to reject the vote of the precinct was not questioned. The doctrine thus laid down by the Elections Committee in the Fourteenth Congress has been followed in an overwhelming number of cases, the most recent being—

Horton *v.* Butler, twelfth Missouri, Fifty-seventh Congress. (Moore's Digest, 15.)

Wagner *v.* Butler, twelfth Missouri, Fifty-seventh Congress. (Moore's Digest, 20.)

Connell *v.* Howell, tenth Pennsylvania, Fifty-eighth Congress. (Moore's Digest, 23.)

Gill *v.* Catlin, eleventh Missouri, Sixty-second Congress. (Moore's Digest, 52.)

Gill *v.* Dyer, twelfth Missouri, Sixty-third Congress. (Moore's Digest, 84.)

The contention that by this procedure honest voters lost their franchise and that the parties are deprived of votes honestly cast for them is overcome by the rule that evidence aliunde may be received to establish what persons honestly voted in such precincts and for whom. Contestee after notice of the charge and after knowledge of the testimony in support thereof that so many fraudulent votes had been cast in the fourth, eighth, and ninth precincts of ward 5 in the city of Boston as to vitiate the returns from that district had ample opportunity, particularly in view of the influence and control exercised over such voters in these precincts by his supporter, Martin M. Lomasney, to produce persons lawfully entitled to vote in said precincts and to prove by their testimony that fact and that they had voted for him. It has at times been suggested that a proper procedure would be to deduct from the return of a tainted precinct the number of fraudulent votes proved and if it can not be established for whom such fraudulent votes were cast to apportion the loss pro rata between the contesting parties. This course would result in the election of the contestant. Your committee, however, is unwilling to adopt this procedure and base its recommendations thereon, because it believes that the number of fraudulent votes in these precincts was greater than the number actually proved; that in the conditions obtaining such fraudulent votes were not cast pro rata between the parties to this contest; that it is a bad precedent and consequently your committee is unwilling to assume responsibility therefor and that as a remedy for the conditions developed by the evidence it is inadequate. Your committee rejects the suggestion that the seat be declared vacant. Such a course in the state of facts proved in this case is contrary to the established practice of the House of Representatives. It is unfair to the contestant and to the honest voters of the tenth congressional district of Massachusetts, the majority of whom voted for him. It is repugnant to the legal maxim that there should be an end to litigation. It is withholding by the House of Representatives the full measure of its disapprobation which it ought to set upon the situation disclosed in this case.

Rejecting these three precincts, your committee finds that the contestant, Peter F. Tague, on the face of the returns, without considering the changes made by the committee in its recount of the ballots, received a plurality of 316 votes over the contestee, John F. Fitzgerald. Giving effect to the revision of the count of ballots, your committee finds that contestant had a plurality of 525.

For the reasons assigned, your committee recommends to the House the adoption of the following resolutions:

1. That John F. Fitzgerald was not elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress and is not entitled to retain a seat herein.

2. That Peter F. Tague was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress and is entitled to a seat herein.

Mr. Luce submitted:

With the conclusion of the majority of the committee that the seat now occupied by John F. Fitzgerald should be declared vacant I agree, but I am of the opinion that Peter F. Tague should not be declared to have been elected, for these reasons: 1. It is not possible to show that Mr. Tague received a plurality of the votes legally cast. 2. The illegal registration of which Mr. Tague complains and which furnishes the only sufficient ground for vacating the seat was a continuance of the conditions that Mr. Tague twice accepted when to his advantage, and that aroused his protest only when turned to his detriment. He may not profit by fraud at which he had connived. 3. To reject the polls of three precincts is not justifiable. 4. When an election is tainted with fraud, the proper remedy is a new election.

. . . The proposal to change the result of an election by rejecting the poll of three precincts raises a question of fundamental importance that the House may usefully consider. It seems rarely if ever to have been fully discussed on its merits, either because involved with partisan considerations or because ignored. Yet resort to the device has become so frequent, its dangers are so manifest and manifold, it so lends itself to partisan abuse, that on an occasion when the issue is between two men of the same political faith, the House may well take advantage of the opportunity to declare, without suspicion of prejudice or bias, what it may deem to be the true rule. . . .

The doctrine that there should be resort to other proof is laid down in numerous cases, but unfortunately they are silent as to what should be done if such proof is not available. For such a situation it seems to me the true rule should be that laid down by a majority of the committee in the congressional case of Curtin *v.* Yocum, in 1880:

> It will be seen from all the authorities that where a new election can be held without injury it is the safest and most equitable rule to declare the election void and refer the question again to the people in all eases where there are a greater number of illegal votes proven, but for whom they voted does not appear, than the return majority of the incumbent.

Mr. Overstreet and Mr. Johnston concluded:

If 11 cases or more of illegal registration were shown, and it was also shown that these men had voted for the contestee, or from all the circumstances it could be reasonably inferred that they did, these votes taken from the contestee would give contestant a plurality.

If contestant could have proven these illegal registrations, what is the necessity of disfranchising hundreds of honest voters?

The majority committee report states that there are 316 eases of illegal registration on prima facie evidence. We deny this, but, if that is so, and

they could show that more than 11 cast their votes for contestee, contestant would be elected, and no honest voter would be disfranchised.

The action of the committee is indefensible for the reason that hundreds of honest voters are disfranchised on insufficient evidence of illegal registration, whereas if only a few eases were proven conclusively the same result could be obtained. . . .

The majority report would seem to indicate that the contestee should have proven that he was elected.

It says that he could have easily brought hundreds of men in to show that they voted for him.

It is a new doctrine that the burden of the proof is on the contestee. The burden is absolutely on the contestant, and it does not shift. There was no responsibility on contestee to bring any of these men to the hearing. If contestant could not prove his ease, there was no obligation, legal or moral, on part of contestee to help him, and it should not be lost sight of that Mr. Tague has never appealed to the election officials or courts of Massachusetts for redress, contenting himself from the start with the statement that he would fight his case out on the floor of Congress. It is unbelievable that a State like Massachusetts would permit such practices as Mr. Tague alleges without proper means of redress.

Upon such flimsy evidence as this Mr. Tague's whole case rests. He has not proved a single one of the charges made by him or made in the brief and argument of his counsel. Both of them charged the various election officials in Massachusetts who had anything to do with the case with crookedness and wrongdoing, to Mr. Tague's disadvantage, yet every member of the committee is satisfied that these officials acted fairly and conscientiously in the performance of their duties. The committee was told by Mr. Tague and his counsel that hundreds of ballots would be found upon which a spurious sticker had been placed, yet not one was found. No effort has been made by him as far as the official records show to purge the ward 5 voting lists of any one of these so-called illegal voters.

Instead, Mr. Tague himself, according to the uncontradicted testimony at the hearings of this case, stands convicted of using his own home and his mother's home for what he terms fraudulent registration.

On page 642 is the testimony of Patrick F. Goggin, a captain in the Boston fire department, who admitted under oath that he registered from Mr. Tague's own home, 21 Monument Square, Charlestown, Mass., for voting purposes, while his wife and four children were living in Somerville since 1914.

On page 647 of the evidence is the statement of Martin Turnbull, cousin of Mr. Tague, who admitted that he registered from Mrs. Tague's home (Mr. Tague's mother) on Corey Street, Charlestown, Mass., while his wife and little girl lived in Somerville.

On page 568, his counsel, Mr. Joseph P. O'Connell, admitted that he lived in Brookline, which was his address in the directory at the time he was elected from Boston to the constitutional convention two years ago.

Yet these are the men who want this Congress to disfranchise more than 1,000 American citizens for the very thing they were doing themselves in order to give Mr. Tague the seat in Congress now held by Mr. Fitzgerald.

Mr. Tague was twice elected under the same conditions he now condemns. Even in this contest he sought the support of the political organization which he now charges with colonization, and only when he was refused support did he begin to complain. In our judgment he is by his conduct estopped.

In conclusion, we submit that the whole case of the contestant rests on allegations and assertions with no substantial proof and that the misstatements made by him in connection with the ballots justifies us in rejecting his uncorroborated testimony about illegal registration.

We therefore submit for the action of the House the following resolution [H. Res. 356] in lieu of the resolution offered by the majority of the committee:

> *Resolved,* That John F. Fitzgerald was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress, and is entitled to a seat therein.

On Oct. 23, 1919, Mr. Goodall, by direction of the Committee on Elections No. 2, submitted House Resolution 355:

> *Resolved,* That John F. Fitzgerald was not elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress and is not entitled to retain a seat herein.

2. That Peter F. Tague was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress and is entitled to a seat herein.

Debate on this resolution was by unanimous consent extended to four and one-half hours, two hours to be controlled by Mr. Overstreet, 45 minutes by Mr. Luce, and the remaining time to be controlled by Mr. Goodall with permission for him to yield to contestant for debate. The previous question was to be considered as ordered on all resolutions offered. After debate, Mr. Overstreet submitted and then withdrew his resolution (H. Res. 356) declaring contestee elected and entitled to retain his seat. Thereupon Mr. Luce offered House Resolution 357 as a substitute for House Resolution 355:

*Resolved,* That neither Peter F. Tague nor John F. Fitzgerald was duly elected a Member of this House from the tenth congressional district of Massachusetts on the 5th day of November, 1918, and that the seat now occupied by the said John F. Fitzgerald be declared vacant.

This substitute resolution was disagreed to by division vote, 46–167. House Resolution 357 was thereupon divided for the vote, and both parts were agreed to by voice vote. [H. Jour. 528, 66th Cong. 1st Sess.]

**§ 2.2 Carney v Berger, 5th Congressional District of Wisconsin.**

*Qualifications of Member.*—A Member-elect having been excluded from seat, after investigation by a special House committee, as not qualified under section 3 of the 14th amendment of the U.S. Constitution (for having given aid or comfort to enemies of the U.S. Government after having taken an oath of office as a Member of a prior Congress), an elections committee concurred in such findings of disqualification.

Report of Committee on Elections No. 1 submitted by Mr. Frederick W. Dallinger, of Massachusetts, on Oct. 24, 1919.

On May 19, 1919, at the organization of the House of Representatives of the Sixty-sixth Congress, Mr. Frederick W. Dallinger, of Massachusetts, objected to the administration of the oath of office to Victor L. Berger and offered the following resolution (H. Res. 6), which was agreed to [58 CONG. REC. 9, 66th Cong. 1st Sess; H. Jour. 7]

> Whereas it is charged that Victor L. Berger, a Representative-elect to the Sixty-sixth Congress from the State of Wisconsin, is ineligible to a seat in the House of Representatives; and
>
> Whereas such charge is made through a Member of the House, and on his responsibility as such a Member, and on the basis, as he asserts, of public records and papers evidencing such an ineligibility:
>
> *Resolved,* That the question of the prima facie right of Victor L. Berger to be sworn in as a Representative of the State of Wisconsin of the Sixty-sixth Congress, as well as of his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House, to be appointed by the Speaker; and until such committee shall report upon and the House decide such question and right, the said Victor L. Berger shall not be sworn in or be permitted to occupy a seat in this House; and said committee shall have power to send for persons and papers and examine witnesses on oath relative to the subject matter of this resolution.

(Adoption of the above resolution was vacated by unanimous consent on June 10, 1919, and the resolution was then amended to incorporate the initial "L" wherever it appears above and readopted.)

Pursuant to House Resolution 6, the select committee after thorough investigation reported the following resolution (H. Res. 380), which was agreed to by the House on Nov. 10, 1919 (311 yeas to 1

nay), after extended debate, and which provided [58 CONG. REC. 8261, 8262, 66th Cong. 1st Sess.; H. Jour. 571]:

*Resolved*, That under the facts and circumstances of this case, Victor L. Berger is not entitled to take the oath of office as a Representative in this House from the fifth congressional district of the State of Wisconsin or to hold a seat therein as such Representative.

Immediately upon the adoption of House Resolution 380, Mr. Dallinger called up House Resolution 384 from the Committee on Elections No. 1.

Report No. 414

CONTESTED ELECTION CASE, CARNEY V BERGER

I. FINDINGS OF FACT

At the election held in the fifth congressional district of the State of Wisconsin on November 5, 1918, Victor L. Berger, the contestee, who was the Socialist candidate, received 17,920 votes; Joseph P. Carney, the contestant, who was the Democratic candidate, received 12,450 votes, and William H. Stafford, who was the Republican candidate, received 10,678 votes. No question is raised in this case as to the regularity of the election or the correctness of the election returns.

Victor L. Berger, the contestee, previously had been elected to Congress as a Socialist to the Sixty-second Congress in 1910 and had taken the usual oath of a Member of Congress to support the Constitution of the United States.

On October 3, 1917, the second-class mailing privilege of the Milwaukee Leader, of which Victor L. Berger, the contestee, was editor in chief, and for the publication of which he was responsible, was revoked by the Postmaster General of the United States for a violation of the provisions of sections 1 and 2 of Title 12 of the act of June 15, 1917, commonly known as the Espionage Act. This action was taken as a result of the publication of a series of articles evidently printed in a spirit of hostility to our Government and with the apparent purpose of hindering and embarrassing the Government in the prosecution of the war.

On February 2, 1918, the contestee, Victor L. Berger, together with Adolph Germer, J. Louis Engdahl, William F. Kruse, and Irwin St. John Tucker, were indicted by the grand jury in the District Court of the United States for the Northern District of Illinois, for a violation of sections 3 and 4 of Title 7 of the Espionage Act.

Both of the above facts, as well as the continued activities of the contestee, both as a member of the national executive committee of the Socialist Party and as editor in chief of the Milwaukee Leader, were well known to the voters of the fifth congressional district of the State of Wisconsin at the election held on November 5, 1918.

Subsequent to the election, Victor L. Berger, the contestee, and his co-defendants were tried before Judge Landis and a Federal jury at Chicago, and on January 8, 1919, were found guilty as charged in the indictment. On February 20, 1919, the contestee was sentenced to 20 years imprisonment in the Federal Prison at Leavenworth, Kans. An appeal was taken by the contestee to the United States Circuit Court of Appeals for the Seventh District, which appeal is still pending.

After careful consideration of all the evidence introduced at the Chicago trial, in addition to the testimony submitted to your committee, your committee concurs with the opinion of the special committee appointed under House resolution No. 6, that Victor L. Berger, the contestee, did obstruct, hinder, and embarrass the Government of the United States in the prosecution of the war and did give aid and comfort to its enemies.

II. LAW APPLICABLE, TO THE CASE

There are two questions of law before your committee: First, Is Victor L. Berger, the contestee, entitled to the seat to which he was elected? and second, if not, Is Joseph P. Carney, the Democratic contestant, who received the next highest number of votes, entitled to the seat?

In regard to the first question, your committee concurs with the opinion of the special committee appointed under House resolution No. 6, that Victor L. Berger, the contestee, because of his disloyalty, is not entitled to the seat to which he was elected, but that in accordance with the unbroken precedents of the House, he should be excluded from membership; and further, that having previously taken an oath as a member of Congress to support the Constitution of the United States, and having subsequently given aid and comfort to the enemies of the United States during the World War, he is absolutely ineligible to membership in the House of Representatives under section 3 of the fourteenth amendment to the Constitution of the United States.

*Contestant.*—An unsuccessful candidate who had not received a plurality of votes cast was held not entitled to the seat upon exclusion of contestee, as English Parliament and state court decisions and opinion of an individual member of a former elections committee to the contrary are not precedents binding on the House.

Report recommending contestant not entitled to seat and recommending declaration of vacancy. Contestant not seated and vacancy declared by the House.

In regard to the second question, your committee is of the opinion that Joseph P. Carney, the Democratic contestant, is not entitled to the seat.

The only congressional precedent cited by counsel for the contestant is the case of Wallace *v.* Simpson in the Forty-first Congress. In this case neither the contestant nor the contestee were sworn in at the convening of the House of Representatives.

The matter was referred to the Committee on Elections and a subcommittee of that committee unanimously reported in favor of the contestant. This report however was based on three grounds:

First. That the ineligibility of the contestee involved the election of the contestant.

Second. That the election was void in six of the nine counties and the contestant had a majority in those counties.

Third. That if no counties were rejected, enough voters were prevented from voting by violence and intimidation to have given the majority in the district to the contestant if they had voted.

The first proposition, which is the one on which counsel for the contestant in the present case relies, was agreed to only by Mr. Cassna, the chairman of the committee, who drew the report; Mr. Hale, agreed to the second and third propositions, and Mr. Randall to the third only. Under a rule of the House at that time a subcommittee was authorized to report directly to the House, and in this case the subcommittee recommended that the contestant be seated and the House accepted the report. (Rowell's Digest of Contested Election Cases, 1790–1901, p. 245.)

It is plainly evident, however, that the proposition that the ineligibility of the contestee involved the election of the contestant was simply the opinion of one member of the committee and did not establish a precedent for the House of Representatives. (Rowell's Digest of Contested Election Cases, 1790–1901, p. 220.)

In the case of Smith *v.* Brown, in the Fortieth Congress, which is cited by counsel for the contestant on the preceding page of his brief, this question is discussed at great length. In that case Brown, the contestee, received 8,922 votes, whereas Smith the contestant received only 2,816 votes. The committee found that Brown, the contestee, had "voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States" and was therefore not entitled to take the oath of office or to be admitted to the House as a Representative from the State of Kentucky. Counsel for Smith, the contestant, claimed that it was a conclusion of law that when the candidate who had received the highest number of votes was ineligible and that the ineligibility was known by those voting for him before casting their votes, the votes thus cast for him should be thrown away and treated as if they were never cast, and that consequently the minority candidate should be declared elected.

In support of this claim he called attention to a large number of cases in the Parliament and courts of Great Britain sustaining this doctrine. After calling attention to the fact that under the English practice public notice of the ineligibility of the candidate must be given to the electors at the time of the election, which was not done in the case at issue, the committee went on to state that it had been unable to find any such law regulating elections in this country in either branch of Congress or in any State legislature, and that an examination of the origin and history of the English rule would show the impossibility of its application to the American House of Representatives. (Reports of Committees, 2d sess. 40th Cong., Vol. I, Report No. 11, p. 6.) . . .

CONGRESS NOT BOUND BY STATE DECISIONS IN ELECTION CASES

In the present case counsel for the contestant cites as an authority the case of Bancroft *v.* Frear, in volume 144, page 79, of the Wisconsin Reports. In this case Frank T. Tucker, candidate for attorney general for the Republican nomination at the primary election held on September 6, 1910, died on September l, 1910, the fact of his death being published generally in the newspapers throughout the State. At the primary election, however, 63,482 votes were cast for him, although deceased, as against 58,196 for Levi H. Bancroft. Upon these facts, the Supreme Court of Wisconsin, by a vote of 4 to 3, decided that Bancroft, who received the next highest number of votes, was entitled to have his name placed upon the final election ballot as the Republican candidate for attorney general. As the minority of the court point out in their dissenting opinion, this decision overruled the well-established and traditional law of Wisconsin, as laid down in the case of State ex rel. Dunning *v.* Giles (144 Wis., p. 101).

It is contended, however, by counsel for the contestant in the present case that Congress is bound by the laws of the States and inasmuch as the case of Bancroft *v.* Frear is now the law in the State of Wisconsin, that the House of Representatives is bound thereby, and that Joseph P. Carney, the Democratic contestant, is therefore entitled to a seat in the House. Such, however, in the opinion of your committee, is *not* the law.

In the Mississippi contested election case of Lynch *v.* Chalmers, in the Forty-seventh Congress, it was determined by the House of Representatives that the House does not consider itself actually bound by the construction which a State court puts on the State law regulating the times, places, and manner of holding elections and that the courts of the State have nothing to do with judging elections, qualifications, and returns of Representatives in Congress. (Hinds' Precedents, vol. 2, p. 264.) . . .

III. CONCLUSION

Your committee, upon all the law and the evidence, is of the opinion that, first, Victor L. Berger, the contestee, is not entitled to the seat to which he was elected; and, second, that Joseph P. Carney, the Democratic contestant, who received the next highest number of votes, is not entitled to the seat. Inasmuch as the special committee appointed under authority of House resolution No. 6 has already recommended to the House a resolution declaring the contestee ineligible, it is not necessary for your Committee on Elections No. 1 to make a similar recommendation. The committee, however, does recommend the adoption of the following resolutions:

> *Resolved,* That Joseph P. Carney, not having received a plurality of the votes cast for Representative in this House from the fifth congressional district of Wisconsin, is not entitled to a seat therein as such Representative.
>
> *Resolved,* That the Speaker be directed to notify the governor of Wisconsin that a vacancy exists in the representation in this House from the fifth congressional district of Wisconsin.

Reported privileged resolution (H. Res. 384) agreed to after brief debate by voice vote [58 CONG. REC. 8262, 66th Cong. 1st Sess., Nov. 10, 1919; H. Jour. 572].

**§ 2.3 Memorial of Albert L. Reeves (Reeves v Bland), 5th Congressional District of Missouri.**

*Notice of contest* was not served within required time and delay not excusable; therefore petition by defeated candidate alleging election fraud denied by committee after Federal Appeals Court had restrained petitioner from proceeding with statutory contest. Committee report laid on table after stricken from House calendar, and laid on table. Seated Member retained seat.

Report of Committee on Elections No. 1 submitted by Mr. Frederick W. Dallinger, of Massachusetts, on Nov. 7, 1919, follows:

Report No. 449

MEMORIAL OF ALBERT L. REEVES (REEVES V BLAND)

The Committee on Elections No. 1, to which was referred the memorial of Albert L. Reeves praying for an investigation of the conduct of the election of a Representative in Congress from the fifth congressional district of Missouri, having completed its investigation and consideration of the same, respectfully submits herewith its report to the House of Representatives.

The memorial with the accompanying exhibits will be found in full on pages 38 to 134, inclusive, of the printed hearings. Its allegations may be briefly summarized as follows:

1. That at the election held November 5, 1918, according to the returns William T. Bland, the Democratic candidate for Congress from the fifth congressional district of Missouri, received 31,571 votes, and Albert L. Reeves, the Republican candidate, received 18,550 votes.

2. That the Democratic candidate, William T. Bland, was declared duly elected and on November 19, 1918, the secretary of state issued to him a certificate of election.

3. That the Republican candidate, Albert L. Reeves, believing that wholesale frauds had been perpetrated at the election in the interest of the Democratic candidate, prepared a notice of contest and complaint, but neither he nor his attorneys were able to procure service of said notice of contest upon William T. Bland, the contestee, for the reasons that the latter absented himself from the district and State during—

> practically the entire 30-day period immediately following the issuance of the certificate of election; that he had caused his office to be closed and his whereabouts concealed from the contestant until after the time prescribed by law within which to serve such notice had expired and until 18 days thereafter, to wit, January 6, 1919, upon which day the contestant, his attorneys and agents, located the said William T. Bland at San Diego, Calif., and then

and there served upon him a copy of said notice of contest and complaint.

4. That on January 29, 1919, William T. Bland filed a petition in the circuit court of Jackson County, Mo., praying for an order enjoining the said Albert L. Reeves from taking any steps as contestant pursuant to said notice. The case was transferred to the United States District Court for the Western District of Missouri, which, on February 6, 1919, denied the injunction.

5. That on February 7, 1919, Albert L. Reeves served notice upon William T. Bland of his intention to take depositions in accordance with the statutes, beginning February 13, 1919. Thereupon William T. Bland took an appeal to the United States Circuit Court of Appeals of the Eighth Circuit, which, on February 10, 1919, granted a temporary restraining order enjoining Reeves from further proceeding in said contest.

6. That abundant testimony is obtainable to sustain the allegations of fraud set forth in the notice of contest and complaint.

Hearings were held by your committee on June 9 and 10, 1919, at which the petitioner, Albert L. Reeves, was represented by David M. Proctor, Esq., and Charles C. Madison, Esq., and the respondent, William T. Bland, was represented by J. G. L. Harvey, Esq.

### I. FINDINGS OF FACT

Your committee finds the facts in this case to be as follows: According to the face of the returns William T. Bland, Democrat, received 31,571 votes and Albert L. Reeves, Republican, received 18,550 votes, and on November 19, 1918, the secretary of state declared William T. Bland to be duly elected as Member of Congress from the fifth district of the State of Missouri and issued to him a certificate of election.

William T. Bland remained at his home in Kansas City from November 5, 1918, until November 27, when he went to Memphis, Tenn., to visit his son who was a pilot in the Aviation Service of the Government. On December 3 he went to Washington, D.C., and from there returned to Kansas City by way of Memphis, reaching home on December 13, where he remained until December 23, when he left for California on account of his wife's health. During all the time he was away from home he was in constant touch with his office, No. 608 Ridge Arcade, and all important mail was forwarded to him from there. There was no evidence of any attempt on his part to conceal his whereabouts or to prevent the service upon him of any legal paper. Moreover, during the entire period from November 19, 1918, to December 19, 1918, he had no intimation that his election was to be contested.

Mr. David M. Proctor, one of the attorneys for Albert L. Reeves, admitted at the hearings that the notice of contest in the case was not prepared until December 22, 1918, so that it could not have been served upon Mr. Bland between November 19 and December 19, even if Mr. Bland had remained in Kansas City during the entire period.

The petitioner, Albert L. Reeves, was enjoined from taking any testimony by order of the United States circuit court of appeals, the course of the judicial proceedings being accurately stated in the memorial.

At the hearings before your committee, counsel for the petitioner presented a large number of sworn affidavits, together with statements and letters from citizens of Kansas City and numerous editorials and articles from local newspapers, which indicate the undoubted existence of deliberate and widespread frauds in many of the wards in Kansas City at the election held on November 5, 1918. These frauds consisted of fraudulent registration, repeating, intimidation, and intentional wrongful counting of ballots.

II. THE LAW APPLICABLE TO THE CASE

Section 105 of the Revised Statutes of the United States provides as follows:

> Whenever any person intends to contest an election of any Member of the House of Representatives of the United States he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice, in writing, to the Member whose seat he designs to contest, of his intention to contest the same, and, in such notice, shall specify particularly the grounds upon which he relies in the contest.

While it is true that paragraph 5 for section 5 of Article I of the Constitution of the United States provides that "each House shall be the judge of the elections, returns, and qualifications of its own Members," nevertheless the House of Representatives has never disregarded the provisions of the act of Congress above quoted prescribing the method in which contested-election cases must be conducted, except for cause. In the case of McLean *v.* Bowman in the Sixty-second Congress (Moore's Digest of Contested Election Cases, 1901–1917, p. 54), the Committee on Elections No. 1, in its report, asserted that "the statute was merely directory and was intended to promote the prompt institution of contests and to establish a wholesome rule not to be departed from *except for cause*," but at the same time held that the excuse of sickness did not justify the contestant in not serving his notice of contest within the 30 days required by the statute and that he had lost his rights. Inasmuch, however, as the contestee in that case had permitted the taking of testimony, the reference of the case to the committee, and its hearing and argument before the committee, it was held that he was in no position to object to such a consideration of the record as would determine in the public interest whether or not he was entitled to a seat in the House. As a matter of fact the committee found on the record in the case such fraud and corruption on the part of the contestee or his agents at the election that it brought in a resolution declaring the contestee not elected.

In the present case the evidence shows that the petitioner and would-be contestant Albert L. Reeves did not sign the notice of contest until December 31, 1918, which was 12 days after the 30-day period prescribed by the stat-

ute had expired. (See p. 54 of printed record.) Moreover, the evidence further shows that the notice was not even prepared by Mr. Reeves's counsel until December 22, or 3 days after the statutory period had expired. (See p. 181 of printed record.) In this case, therefore, there was no excuse for noncompliance with the plain provision of the statute.

III. CONCLUSION

As has already been stated a mass of ex parte testimony was before your committee indicating extensive and widespread frauds in many of the wards in Kansas City at the last State election and your committee has been strongly urged by the newspaper press, by various nonpartisan civic bodies and by numerous citizens of Kansas City of both political parties to report a resolution providing for an investigation *de novo* of the election in the fifth Missouri district. If the facts alleged in the memorial were true and the petitioner, Albert L. Reeves, had been prevented from serving the notice required by law by the action of the sitting Member, Mr. Bland, your committee might have seen its way clear to report a resolution for an investigation of the conduct of this election.

It is to be regretted that the plain provisions of the statute regulating the election contests were not complied with by the petitioner in this case. The committee is earnestly desirous of preventing, so far as it is possible for it to do, the existence and repetition of any such fraud and wanton disregard of law as the ex parte testimony in this case indicates was practiced in some of the Kansas City wards at the election on November 5, 1918.

Much of such conduct which is fundamentally destructive of a representative Government must be dealt with by the conscience, judgment, and power of the community itself and by the courts of the State, but as facts may be brought before the committee, within the time and in the manner provided by law, the committee will always endeavor to prevent any one from enjoying the fruits of such wrong. Under the circumstances, however, although viewing with the deepest concern the charges of wholesale frauds practiced at the last election in Kansas City, we do not feel justified in granting the prayer in the memorial and therefore report that no action is necessary thereon.

Privileged committee report, referred to House Calendar (Nov. 7, 1919), stricken from calendar and laid on table by unanimous consent [58 CONG. REC. 8350, 66th Cong. 1st Sess., Nov. 11, 1919; H. Jour. 575].

**§ 2.4 Salts or Major, 7th Congressional District of Missouri.**

*Ballots,* where available as best evidence, were examined and recounted by an elections committee, while remaining partial recount was based upon secondary evidence where ballots were not available.

*Returns* were not rejected in precincts where tally sheets were irregularly altered by election officials to correct errors, absent fraud.

Report of Committee on Elections No. 1 submitted by Mr. Frederick W. Dallinger, of Massachusetts, on May 11, 1920, follows:

Report No. 961

CONTESTED ELECTION CASE, SALTS V MAJOR

STATEMENT OF THE CASE

At the election held in the seventh congressional district of the State of Missouri on November 5, 1918, according to the official returns, Sam C. Major, the contestee, who was the Democratic candidate, received 20,300 votes; and James D. Salts, the contestant, who was the Republican candidate, received 20,222 votes. As a result of these returns, Sam C. Major, the contestee, was declared elected by a plurality of 78 votes over his Republican opponent, James D. Salts, and a certificate of election was duly issued to him by the secretary of state of Missouri. . . .

First: that there was a fraudulent alteration of the tally sheet and official record of the vote as to the candidates for Congress in the second ward of the city of Sedalia, in Pettis County, whereby 40 tallies were taken from the vote of the contestant and 40 tallies added to the vote of the contestee, making a change in the net result of the vote amounting to 80 votes favorable to the contestee and unfavorable to the contestant, and that, therefore, the contestant should be credited with 40 additional votes and that the vote of the contestee should be reduced by 40 votes.

Second: that a mistake was made in the tabulation of the vote in Boone Township in Green County, whereby through inadvertence and oversight on the part of the judges of election, the contestant was not given 37 votes to which he was lawfully entitled and that, therefore, he should be credited with 37 additional votes.

In his brief, the contestant admits that the contestee is entitled to 6 additional votes in Bowling Green Township, in Pettis County, and to 2 additional votes in Sedalia Township in the same county. With these corrections in the official record, the contestant James D. Salts claims that he was elected by a plurality of 31 votes over the contestee Sam C. Major.

On January 16, 1919, the contestee served on the contestant an answer denying all the allegations contained in the contestant's notice and making numerous allegations of irregularities in many voting precincts of the district. In the contestee's brief as filed with the committee, however, he relied entirely upon the claim that he was entitled to 6 additional votes in Bowling Green Township, in Pettis County, and to 2 additional votes in Precinct No. 1, in Sedalia Township in the same county, and upon the further claim that the entire vote of the fourth ward of the city of Springfield, in Green County, should be thrown out and not counted because of the fact that the election officials in that ward failed to place on the back of the ballots voted therein the registration number of the voters as required by the election laws of the State of Missouri.

In this ward, according to the official returns, the contestant received 206 votes and the contestee 141 votes. The contestee, therefore, contended that

the official returns are correct with the exception of the eight additional votes before referred to, to which he claims that he was entitled; and with the further exception of the entire vote of the fourth ward of the city of Springfield which, according to his contention, should be entirely thrown out. The contestee therefore claims that he was duly elected by a plurality of 151 votes over the contestant.

### WORK OF THE COMMITTEE

The testimony in the case having been printed, and printed briefs having been duly filed with the committee by both parties as well as a reply brief by the contestant, a hearing was given to the parties by your committee on Tuesday, March 16, 1920, at which oral arguments were presented by J. O. Patterson, Esq., in behalf of the contestant and by Frank M. McDavid, Esq., as counsel for the contestee.

At the close of the hearing the committee, believing that the ballots themselves were the best evidence for determining what actually took place at the election, voted to request the Sergeant at Arms to send for the ballots, poll books, and tally sheets in Boone Township, in Green County, and in the second ward of the city of Sedalia in Pettis County. The county clerk of Pettis County reported that, in accordance with the election law of the State of Missouri, he had destroyed all ballots cast at the election held November 5, 1918, at the expiration of one year from the date thereof. The county clerk of Green County, however, in accordance with the Sergeant at Arms' request, sent the ballots, poll book, and tally sheet in the case of Boone Township, and on Wednesday, April 21, 1920, your committee counted the ballots cast in said township with the following result:

| | |
|---|---|
| Total number of ballots cast | 488 |
| James D. Salts, Republican, received | 291 |
| Sam C. Major, Democrat, received | 177 |
| Jonathan H. Allison, Socialist, received | 4 |
| Blank ballots | 16 |
| Total | 488 |

According to the original official count in this township James D. Salts, Republican, received 259 votes and Sam C. Major, Democrat, received 175 votes. According to the recount of the committee, therefore, the contestant James D. Salts was entitled to 32 more votes than were credited to him by the official count, and the contestee Sam C. Major was entitled to 2 votes more than he was credited with on the official count, making a net gain for James D. Salts, the Republican contestant of 30 votes instead of the 37 which he claimed in his brief.

### FINDINGS OF FACT

Your committee therefore finds that the contestant James D. Salts is entitled to 32 additional votes in Boone Township, Green County; and that the

contestee Sam C. Major is entitled to 2 additional votes in Boone Township, in Green County; to 2 additional votes in Sedalia Township, and to 6 additional votes in Bowling Green Township, both of which are in Pettis County, making in all 10 additional votes.

In regard to the vote in the second ward of the city of Sedalia, in Pettis County, where the contestant claims that through a fraudulent alteration of the tally sheet 40 votes were taken from him and added to the vote of his opponent, in the absence of the ballots themselves, the committee was obliged to rely upon the testimony as contained in the record of the case. While it is true that the tally sheet and the official record were altered, the overwhelming weight of the testimony shows that there was no fraud involved, but that the alterations were honestly made to correct a mistake of an incompetent election clerk. The evidence discloses the fact that the two election clerks in this ward on election day were Charles P. Keck, Republican, and Mark A. Magruder, Democrat. It also appears from the evidence that Mr. Keck, the Republican clerk, was a bank cashier, while Mr. Magruder, the Democratic clerk, was inexperienced in clerical work and had continual trouble with his tally sheet during the day; and that when the vote was tabulated on election night it was found that Mr. Magruder's total did not agree with that of Mr. Keck as to several of the offices, including that of Congressman. Mr. Kell, the Republican judge of elections, thereupon instructed Mr. Magruder to make his totals agree with those of Mr. Keck. In accordance with these instructions Mr. Magruder made the changes in the tally sheet which are complained of by the contestant.

That the alterations in the tally sheet were honestly made to correct a mistake is corroborated by the further testimony that Mr. Major, the Democratic candidate for Congress, ran ahead of his ticket in that ward, and received a good many Republican votes. This testimony is, in turn, supported by the fact that the official returns in other parts of the district and the ballots in Boone Township, which were counted by your committee, show conclusively that the name of Mr. Salts was scratched on the Republican ticket and that Mr. Major, the Democratic candidate, received more votes than the regular Democratic ticket. Your committee therefore finds that the official returns of the second ward in Sedalia, as certified to by the election officers and the secretary of state, are the correct returns, and that James D. Salts, the Republican candidate, is not entitled to any additional votes from said ward.

Your committee therefore finds that at the election held on November 5, 1918, in the seventh congressional district of the State of Missouri, Sam C. Major, the Democratic candidate, received 20,310 votes, and that James D. Salts, the Republican candidate, received 20,254 votes, and that, therefore, Sam C. Major, the Democratic candidate was duly elected over said James D. Salts by a plurality of 56 votes.

*State election law.*—An elections committee refused to consider contestee's allegation that a statute requiring placement of registration numbers on ballots violated the state constitution.

*State election law* prohibiting the counting of ballots not containing registration numbers, though considered mandatory and sufficient to void entire returns of precinct where such ballots were cast, became a moot question where rejection of such returns would not change election result.

Report for contestee, who retained seat.

THE QUESTION OF THE VOTE IN THE FOURTH WARD OF THE CITY OF SPRINGFIELD

The committee having found that as a matter of fact Sam C. Major, the Democratic candidate, was duly elected, it is unnecessary to consider the claim raised by counsel for the contestee that the entire vote of the fourth ward of the city of Springfield which was included in the official returns, should be thrown out. Your committee, however, is of the opinion that attention ought to be called to the fact that the precedents of the House of Representatives clearly support the contention of the contestee in this matter.

It is admitted that section 5905 of the Revised Statutes of the State of Missouri (1909) provides that in cities where registration of voters is required—and it is also admitted that Springfield is one of such cities—the clerks of election shall place on each ballot "the number corresponding with the number opposite the name of the person voting, found on the registration list, and no ballot not so numbered shall be counted."

It is further admitted that this provision has been in the statutes of the State of Missouri for many years and that it has never been declared to be in conflict with the constitution of that State by any tribunal either Federal or State.

The contestant in this case claims that this statute is unconstitutional, but the Committee on Elections No. 1 of this House said in its report in the case of Gerling *v.* Dunn, from the thirty-eighth congressional district of the State of New York in the Sixty-fifth Congress (65th Cong., 3d sess., Rept. No. 1074, p. 2):

> It has not been and should never be the policy of the House of Representatives to pass upon the validity of State laws under which elections are held when the complaint is that the legislative enactment is contrary to the provisions of the State constitution.

The contestant further claimed that the provision of the Missouri statute requiring the registration number of the voter to be placed upon each ballot by the election officers is a directory and not a mandatory provision, and that the voters of the fourth ward of the city of Springfield ought not to be deprived of their vote because of the failure on the part of the election officers to comply with this provision of the statute. Upon this point also the contention of the contestant is contrary to the well-established precedents of the House of Representatives.

In the Alaska contested election ease of Wiekersham *v.* Sulzer, in the Sixty-fifth Congress, the whole question of mandatory and directory provi-

sions of election statutes was discussed at length by the Committee on Elections No. 1 of that Congress. The committee in its report (65th Cong., 3d sess., Rept. No. 839, p. 6) said:

> It has been repeatedly held that where the law itself forbids the counting of ballots of certain kinds or forms that do not meet the provisions of the statute it is mandatory, and that it should be so construed by the courts.

In support of this doctrine the committee cited the cases of Miller *v.* Elliot, in the Fifty-second Congress (Rowell's Digest, p. 461), Thrasher *v.* Enloe, in the Fifty-third Congress (Rowell's Digest, p. 487), and also quoted with approval the case of Horsefall *v.* School District (143 Mo., 542), in which the court lays down the well-established law involved in this question, as follows:

> If the statute provides specifically that a ballot not in prescribed form shall not be counted, then the provision is mandatory and the courts will enforce it; but if the statute simply provides that certain things shall be done and does not prescribe what results shall follow if these things are not done, then the provision is directory merely.

In the present case the Missouri statute provides specifically that "no ballot not so numbered shall be counted," and is clearly mandatory and not directory. Accordingly, if the other facts in the case did not clearly show that Sam C. Major, the Democratic candidate, was duly elected, the committee would be obliged, if it followed its own precedents, to hold as a matter of law that the vote of the fourth ward of the city of Springfield should be entirely thrown out. If this were done, then even if the entire contention of the contestant as set forth in his brief were granted, the contestant would have only 20,093 votes, whereas the contestee would be entitled to 20,127 votes and would still be elected by a plurality of 34 votes.

If, however, we take the facts as to the correct returns of the election as found by the committee in this report and then throw out the entire vote of the fourth ward of the city of Springfield in accordance with the law and the precedents of Congress, it would make the total vote of the contestee, Sam C. Major, 20,169 and the total vote of James D. Salts, the contestant, 20,048, which would give the contestee a plurality of 121 votes over the contestant.

CONCLUSION

Your committee, therefore, for the reasons hereinbefore stated, respectfully recommends to the House of Representatives the adoption of the following resolutions:

> *Resolved*, That James D. Salts was not elected a Representative in this Congress from the seventh congressional district of the State of Missouri and is not entitled to a seat herein.

> *Resolved,* That Sam C. Major was duly elected a Representative in this Congress from the seventh congressional district of the State of Missouri and is entitled to retain a seat herein.

Privileged resolution (H. Res. 562) agreed to by voice vote after brief debate [59 CONG. REC. 7231, 66th Cong. 2d Sess., May 18, 1920; H. Jour. 412].

**§ 2.5 Bodenstab v Berger, 5th Congressional District of Wisconsin.**

*Qualifications of Member.*—A Member-elect having been elected to fill the vacancy caused by his initial exclusion from his seat and having again been excluded by the House as not qualified under section 3 of the 14th amendment to the U.S. Constitution, an elections committee again concurred in such disqualification.

Report of Committee on Elections No. 1 submitted by Mr. Frederick W. Dallinger, of Massachusetts, on Feb. 5, 1921, follows:

Report No. 1300

CONTESTED ELECTION CASE, BODENSTAB V BERGER

I. FINDINGS OF FACT

At the regular election held in the fifth congressional district of the State of Wisconsin, on November 5, 1918, Victor L. Berger, the contestee, who was the Socialist candidate, received 17,920 votes; Joseph P. Carney, who was the Democratic candidate, received 12,450 votes; and William H. Stafford, who was the Republican candidate, received 10,678 votes.

No question was raised in that case as to the regularity of the election or the correctness of the election returns.

Objection, however, was made on the floor of the House to the swearing in of Victor L. Berger, the contestee, when he presented himself with his certificate of election, and the question of his eligibility to a seat in the House was referred to a special committee, which was appointed by the Speaker May 21, 1919.

After an exhaustive investigation this special committee, on October 24, 1919, submitted its report to the House of Representatives, which report was printed as Report No. 413 of the first session of the Sixty-sixth Congress. After a long debate, in the course of which Victor L. Berger, the contestee, was given every opportunity to speak in his own behalf, the House of Representatives on November 10, 1919, by a vote of 311 to 1 on a roll call, adopted the following resolution:

> *Resolved,* That under the facts and circumstances of this case, Victor L. Berger is not entitled to take the oath of office as a Representative in this House from the fifth congressional district of the State of Wisconsin or to hold a seat therein as such Representative. [Congressional Record, Sixty-sixth Congress, first session, p. 8727.]

The ground upon which the committee made its report and upon which the House adopted the above resolution recommended by the committee was that Victor L. Berger, the contestee, was ineligible under the fourteenth amendment to the Constitution of the United States to membership in the House of Representatives for the reason that having been previously elected to the Sixty-second Congress in 1910 and having taken the usual oath of a Member of Congress to support the Constitution of the United States, he had subsequently given aid and comfort to the enemies of the United States during the War with Germany.

Shortly after the appointment of the special committee above referred to, the contested-election case of Joseph P. Carney *v.* Victor L. Berger, from the fifth congressional district of the State of Wisconsin, was duly referred to the Committee on Elections No. 1, and this committee, after a careful investigation, on October 24, 1919, submitted its report to the House of Representatives, which report is printed as Report No. 414 of the first session of the Sixty-sixth Congress. In this report the Committee on Elections No. 1 concurred in the findings of the report of the special committee, that Victor L. Berger, the contestee, was not entitled to the seat to which he was elected on the face of the returns, and also found that Joseph P. Carney, his Democratic contestant, who received the next highest number of votes, was not entitled to the seat, the committee recommending the adoption of the following resolution, which was adopted by the House of Representatives on November 10, 1919, without a division:

> *Resolved,* That Joseph P. Carney, not having received a plurality of the votes cast for Representative in this House from the fifth congressional district of the State of Wisconsin, is not entitled to a seat therein as such Representative.
>
> *Resolved,* That the Speaker be directed to notify the governor of Wisconsin that a vacancy exists in the representation in this House from the fifth congressional district of Wisconsin. [Congressional Record, Sixty-sixth Congress, first session, p. 8728.]

Subsequently the governor of Wisconsin called a special election to fill the vacancy from the fifth congressional district of the State of Wisconsin.

At this special election, held in the fifth congressional district of the State of Wisconsin on December 19, 1919, Victor L. Berger, the contestee, who was the Socialist candidate, received 24,350 votes and the contestant, Henry H. Bodenstab, who was the Republican candidate and endorsed by the Democratic Party, received 19,566 votes.

No question was raised in this case as to the regularity of the election or the correctness of the election returns.

When the contestee, Victor L. Berger, to whom a certificate of election had been issued, appeared to take the oath of office on January 10, 1920, the House of Representatives adopted the following resolution on a roll call by a vote of 330 to 6:

> Whereas Victor L. Berger, at the special session of the Sixty-sixth Congress, presented his credentials as a Representative

elect to said Congress from the fifth congressional district of the State of Wisconsin; and

Whereas on November 10, 1919, the House of Representatives, by a vote of 311 to 1, adopted a resolution declaring that "Victor L. Berger is not entitled to take the oath of office as a Representative in this House from the fifth congressional district of the State of Wisconsin or to hold a seat therein as such Representative," by reason of the fact that he had violated a law of the United States, and, having previously taken an oath as a Member of Congress to support the Constitution of the United States, had given aid and comfort to the enemies of the United States, and for other good and sufficient reasons; and

Whereas the said Victor L. Berger now presents his credentials to fill the vacancy caused by his own ineligibility; and

Whereas the same facts exist now which the House determined made the said Victor L. Berger ineligible to a seat in said House as a Representative from said district: Now, therefore, be it

*Resolved*, That by reason of the facts herein stated, and by reason of the action of the House heretofore taken, the said Victor L. Berger is hereby declared not entitled to a seat in the Sixty-sixth Congress as a Representative from the said fifth district of the State of Wisconsin and the House declines to permit him to take the oath and qualify as such Representative. [Congressional Record, Sixty-sixth Congress, second session, p. 1399.]

No action, however, was taken at that time upon the contested-election case of Henry H. Bodenstab *v.* Victor L. Berger, for the reason that the pleadings required by statute had not at that time been completed, and the case, therefore, had not reached the House of Representatives. The testimony and briefs did not reach the Clerk of the House of Representatives and the case was not referred to your Committee on Elections No. 1 until shortly before the end of the second session of the Sixty-sixth Congress.

Inasmuch as two committees of the House of Representatives have twice reported that Victor L. Berger, the contestee, is not eligible to membership in the House of Representatives, and inasmuch as the House of Representatives itself has twice, by an overwhelming vote, refused to seat the said Victor L. Berger, the contestee, on the ground that he is ineligible to membership therein, and inasmuch as there is no additional testimony in this case, your committee finds that Victor L. Berger, the contestee, is ineligible to membership in the House of Representatives, but recommends no resolution, for the reason that the House of Representatives has already finally determined that question so far as the present Congress is concerned.

*Contestant.*—An unsuccessful candidate who had not received a plurality of votes cast in the special election was held not entitled to a seat upon exclusion of contestee, even though voters had notice of contestee's ineligibility, as precedents cited by contestant either were not binding on the House or were distinguishable on the facts.

Majority report recommending contestant not entitled to seat.
Minority views for contestant, who was not seated.

This committee having previously reported in the case of Joseph P. Carney *v.* Victor L. Berger that Joseph P. Carney, the Democratic contestant, was not entitled to a seat in the House of Representatives for the reason that he did not receive a plurality of the votes cast in the district, the only question of fact that remains to be considered is whether the facts of the present case furnish any additional reason why this committee should reverse its former opinion and find that the Republican contestee, Henry H. Bodenstab, should be declared entitled to a seat in the House of Representatives.

At the time of the regular election, on November 5, 1918, Victor L. Berger, the contestee, had been indicted by a grand jury in the District Court of the United States for the Northern District of Illinois, for violations of sections 3 and 4, title 7, of the espionage act. On the other hand, at the time of the special election held on the 19th day of December, 1919, Victor L. Berger, the contestee; had been convicted of the crime for which he had been indicted by the United States District Court for the Northern District of Illinois, and had been sentenced to 20 years' imprisonment in the Federal prison at Leavenworth, Kans. Moreover, at the time of said special election Victor L. Berger, the contestee, had been declared ineligible to a seat in the House of Representatives by resolution adopted by the House of Representatives on November 10, 1919, to which reference has already been made. As a matter of fact, therefore, the voters of the fifth congressional district of the State of Wisconsin had notice of the fact that Victor L. Berger, the contestee, had been adjudged ineligible to a seat in the House of Representatives, and in spite of that fact 24,350 legal voters of the district voted for him for the office of Representative in Congress.

II. LAW APPLICABLE TO THE CASE

In the previous contested-election case of Carney *v.* Berger, counsel for the contestant, Joseph P. Carney, cited as an authority the case of Bancroft *v.* Frear in volume 144, page 79 of the Wisconsin Reports, which case is also cited by the contestant in the present case. In that case Frank T. Tucker, candidate for attorney general for the Republican nomination at the primary election held on September 6, 1910, died on September 1, 1910, the fact of his death being published generally in the newspapers throughout the State. At the primary election, however, 63,482 votes were cast for him, although deceased, as against 58,196 votes cast for Levi H. Bancroft. Upon these facts the Supreme Court of Wisconsin, by a vote of 4 to 3, decided that Levi H. Bancroft, who received the next highest number of votes, was entitled to have his name placed upon the final election ballot as the Republican candidate for attorney general. As the minority pointed out in their dissenting opinion, this decision overruled the well-established and traditional law of Wisconsin as laid down in the case of State ex rel. Dunning *v.* Giles (144 Wis., 101).

The only congressional precedent cited by counsel for the contestant in the case of Carney *v.* Berger is the case of Wallace *v.* Simpson, in the Forty-first Congress, which your committee found was no precedent at all, for the reason that only one of the members of the Committee on Elections in that case contended for the doctrine that the ineligibility of the contestee involved the election of the contestant, the case having been decided by a majority of the committee on other grounds. (Rowell's Digest of Contested Election Cases, 1790–1901, p. 2450.)

On the other hand, in the case of Smith *v.* Brown, in the Fortieth Congress, while the Committee on Elections at that time found that the doctrine that where a contestee receives a majority of the votes cast but is found to be ineligible, the candidate having the next highest number of votes is entitled to his seat, has been the prevailing doctrine in Great Britain, it never has been recognized by the United States House of Representatives. . . .

The committee also found that precisely the same question was raised in the contested-election case of Maxwell *v.* Cannon in the Forty-third Congress; in the case of Campbell *v.* Cannon, in the Forty-seventh Congress; and in the case of Lowry *v.* White, in the Fiftieth Congress; in all of which the Committee on Elections of the House of Representatives rejected the doctrine that where the candidate who received the highest number of votes is ineligible, the candidate receiving the next highest number of votes is entitled to the office.

In the previous case of Carney *v.* Berger, your committee also considered very carefully the general question of whether Congress is bound by the law of the State in which the contest arises.

After an exhaustive examination of the authorities, your committee came to the unanimous conclusion that where the law of a State in a matter of this kind is contrary to the unbroken precedents of the House of Representatives in election cases the congressional precedent must prevail, anything in the laws of the State or decisions of its supreme court to the contrary notwithstanding.

While it is true that in the present case the voters of the fifth congressional district of Wisconsin can fairly be said to have had constructive notice of the fact that Victor L. Berger, the contestee, was ineligible to membership in the House of Representatives, which circumstance was lacking in the case of Carney *v.* Berger, nevertheless this additional fact offers no reason why your committee and the House of Representatives should allow a decision of the Supreme Court of Wisconsin or of any other State to override an unbroken line of congressional precedents and establish a new rule in determining contested-election cases in the Congress of the United States.

In the present case counsel for the contestant cites as additional authority for seating the contestant, Henry H. Bodenstab, the case of McKee *v.* Young, in the Fortieth Congress, and asks that the 24,350 votes returned as being cast for Victor L. Berger, the contestee, be thrown out as illegal votes, leaving the 19,566 votes cast for Henry H. Bodenstab, the contestant, as the only legal votes cast, which would result in a unanimous election for Mr. Bodenstab, the contestant. Your committee, however, fails to find any parallel between the present case and the case of McKee *v.* Young. In the latter

case the contestant claimed the right to the seat on the ground that the ineligibility of the majority candidate gave the seat to the person having the next highest number of votes. The Committee on Elections, however, overruled this contention in accordance with the unbroken practice of the House of Representatives. The contestant then claimed to have received a majority of the votes legally cast.

There was evidence in that case tending to show that over 2,000 returned Confederate soldiers voted for the contestee, although the specific proof only showed 752 by name. The contestant also claimed that the entire vote in certain election precincts should be thrown out on the ground that the officers of election in those precincts were returned Confederate soldiers. The majority of the committee held that the votes cast by the Confederate soldiers should be rejected on the ground that they were paroled prisoners not yet pardoned. The proclamation of amnesty issued by the President of the United States had expressly excepted "all prisoners who left their homes within the jurisdiction and protection of the United States and passed beyond the Federal military lines into the pretended Confederates States for the purpose of aiding the rebellion." This necessarily applied to all Confederate soldiers from Kentucky, and, consequently, not having been pardoned they were still prisoners of war and had no more right to vote for representative in Congress than an enemy in the field. The majority of the committee also held that the congressional statute requiring the judges of election to be of opposite political parties and disqualifying rebel adherents from acting as election officers were mandatory and that the entire vote of the precincts where this act was violated should be rejected on the ground that no legal election had been held therein. Throwing out the entire vote of these precincts and the votes of the Confederate soldiers before referred to, the majority of the committee found that the contestant received a majority of the votes cast and was entitled to his seat. (See Rowell's Digest of Contested Election Cases, 1789 to 1901, pp. 222 to 224.)

In the present case there was no evidence whatever submitted to your committee that a single one of the 24,350 votes cast for the contestee, Victor L. Berger, was illegal either because the voter had borne arms against the United States or had given aid and comfort to the enemy during the war with Germany. The contentions advanced by counsel for the contestee that all of the persons who voted for Victor L. Berger, the contestee, were as ineligible to cast their votes as the man for whom they voted was ineligible to a seat in the House of Representatives, or that they should be punished by being compelled to be represented in Congress by a person who was not the choice of the people of the district, are equally untenable.

Upon this point your committee again calls the attention of the House to the clear and convincing statement of the Committee on Elections of the House of Representatives in its exhaustive report in the contested-election case of Smith *v.* Brown in the Fortieth Congress:

> As Congress, much less the House of Representatives, never conceded, never having the power to concede, to a voter his right to the ballot, neither can it take away, modify, or limit it. Least

> of all can this body, the House alone, punish a voter for "obstinacy" or "perversity" in the exercise of his right. . . . It can not touch a voter or prescribe how he shall vote, nor can it impose a penalty on him, much less disfranchise him or say what shall be the effect or the power of his ballot if it be cast in a particular way. The laws of the State determine this. . . .
>
> As has been shown, Parliament did enact a law that votes cast for one ineligible shall be treated as if not cast and one having a minority of the votes be thus elected. But neither has Congress nor Kentucky enacted any such law; much less can this House alone by a resolution set it up, and that too *after the fact as a punishment for "willful obstinacy and misconduct." The right of representation is a sacred right which can not be taken away from the majority. That majority by perversely persisting in casting its vote for one ineligible can lose its representation, but never the right to representation while the Constitution and the State government shall endure.* [Reports of committees, 2d sess., 40th Cong., vol. 1, Rept. No. 11, p. 6. The italics are the committee's.]

III. CONCLUSION

Your committee therefore, upon all the law and the evidence, is of the opinion that while Victor L. Berger, the contestee, is not entitled to the seat to which he was elected at the special election held in the fifth congressional district of the State of Wisconsin on December 19, 1919, and it has been so held by the resolution adopted by the House of Representatives on January 10, 1920, to which reference has already been made, neither is Henry H. Bodenstab, the contestant, entitled to a seat in the House of Representatives for the reasons already set forth. The committee therefore recommends the adoption of the following resolution (H. Res. 696):

> *Resolved*, That Henry H. Bodenstab, not having received a plurality of the votes cast for Representative in this House from the fifth congressional district of Wisconsin, is not entitled to a seat therein as such Representative.

The following minority views were submitted by Mr. Clifford E. Randall, of Wisconsin:

FINDING OF FACTS

The findings of fact as stated by the majority report of the committee are substantially correct and the repetition of such facts herein will serve no useful purpose.

LAW APPLICABLE TO THE CASE

Under the so-called English rule, if the candidate at an election who receives the highest number of votes is ineligible and his disqualification is known to the electors, before they vote for him, their votes are to be consid-

ered as thrown away and the candidates who receives the next highest number of votes shall be declared elected, if he be qualified. (Rex *v.* Parry, 14 East, 549, 104 Eng. Reprint, 712; Reg ex rel. Mackley *v.* Cook, 3 El. and Bl., 249, 118 Eng. Reprint, 1133; Rex *v.* Hawkins, 10 East, 211, 103 Eng. Reprint, 755.)

The English courts of law have unanimously held this rule to be the correct doctrine, and such principle has been declared by the uniform and unbroken current of decisions in the British Parliament from the earliest to the present time.

The rule affirmed by the courts of the United States is that a majority or plurality of votes cast at a popular election for a person ineligible to the office for which such votes are cast, does not confer any right or title to the office upon such an ineligible candidate. Nevertheless the votes so cast will be effectual to prevent the election of an eligible person who received the next highest number of votes in the absence of proof of the fact that *the votes cast for the ineligible candidate were given by the electors with the full knowledge or notice, either actual or constructive, of his ineligibility or disqualification.*

The precise question involved in this case has never been before the House of Representatives. The majority opinion refers to, relies upon, and quotes with approval several House decisions in election cases which are supposed to be inconsistent with the principles of law hereinbefore stated. Examination of these cases demonstrates clearly that in none of them was it established *that the electors had knowledge of the ineligibility of the candidate voted for. . . .*

As hereinbefore stated, all the election cases cited by the majority and herein discussed, namely, Smith *v.* Brown (40th Cong.), McKee *v.* Young (40th Cong.), Maxwell *v.* Cannon (43d Cong.), Campbell *v.* Cannon (47th Cong.), and Lowry *v.* White (50th Cong.), as well as Carney *v.* Berger (66th Cong.), *fail to establish that the electors had knowledge of the ineligibility of the candidates voted for.* These cases are authority only for the rule that where the voters do not know of the disqualification the majority or plurality of the votes cast for a person ineligible to the office for which such votes are cast does not confer any right or title to the office upon such ineligible candidate, but are effectual to prevent the election of an eligible person who received the next highest number of votes and the election will be deemed a nullity.

The testimony, exhibits, and facts in the case under consideration indisputably prove that the electors of the fifth congressional district of Wisconsin *had actual knowledge of the ineligibility* of Victor L. Berger. Prior to the election Mr. Berger had been convicted of a violation of the espionage act and sentenced to 20 years imprisonment at the Federal prison at Fort Leavenworth; and after extended hearings had been excluded from membership in the Sixty-sixth Congress by a record vote of 311 to 1. The calling by the governor of Wisconsin of the special election was notice in itself of Mr. Berger's ineligibility. The judgment of exclusion by the House was final and not subject to modification. Mr. Berger's campaign was one of defiance to the mandate of the House. Before the electors of the district he jeered this

judgment and designated it an insult to the electors and urged the voters to show their contempt and defiance of the action of the House of Representatives by voting for him at the special election. The sole issue in the campaign was his disqualification. The voters knew that if elected he would again be excluded from the Sixty-sixth Congress.

Therefore, it is submitted that upon reason and authority the votes cast for Mr. Berger with full knowledge on the part of the voters that he was ineligible to serve as a Member of the House of Representatives ought to be considered as thrown away, and that the election was legal and that the qualified candidate, Mr. Bodenstab, receiving the highest number of votes and a majority of all votes cast for qualified candidates, was duly elected. It is conceded that a majority have a constitutional right to govern in this country, but it is not conceded that the majority of a congressional district may morally or willfully defeat the Government by refusing to elect a Member qualified to sit in the House of Representatives. In this case the majority of the electors had a right to elect a qualified person to the House of Representatives, but, having waived their right by voting for a person known to be disqualified, as much as though they had refused to vote at all, or had voted for a man known to be dead, the minority who complied with the Constitution by voting for a qualified candidate may well be held to have expressed the will of the people. If the majority, being called upon, will not vote, they can not complain that the election was decided by those who did not vote, though a minority of the electors; and voting for a person known to be disqualified is not voting. Such votes are void and are no votes.

Therefore, the adoption of the following resolution is recommended:

> *Resolved,* That Henry H. Bodenstab was duly elected a Member of Congress from the fifth congressional district of Wisconsin to the Sixty-sixth Congress, on the 19th day of December, 1919, and that he is entitled to a seat in the House of Representatives as such Representative.

The resolution that Mr. Bodenstab was not entitled to a seat (H. Res. 696) was reported as privileged by Mr. Dallinger. While it was pending Mr. Randall's substitute that Mr. Bodenstab was entitled to the seat, was defeated, 8 yeas to 307 nays, 1 present. Mr. Dallinger's resolution was then agreed to by voice vote [60 CONG. REC. 3883, 66th Cong. 3d Sess., Feb. 25, 1921; H. Jour. 248].

§ 2.6 WICKERSHAM v SULZER AND GRIGSBY, TERRITORY OF ALASKA.

*Contestee's* death prior to certification of election having caused the Territory Governor to call a special election to fill the vacancy, a new Delegate-elect was seated and substituted as contestee by the House.

*Evidence* taken ex parte by contestant was held inadmissible, while the time for parties to take testimony was extended upon adoption by the House of a resolution, where death of contestee had prevented timely taking.

*Ballots* cast at the general election were examined and completely recounted by an elections committee upon adoption by the House of a resolution authorizing the production of all ballots and returns from the general and special elections.

Majority report of Committee on Elections No. 3 submitted by Mr. Cassius C. Dowell, of Iowa, on Feb. 12, 1921, follows:

Report No. 1319

CONTESTED ELECTION CASE, WICKERSHAM V SULZER AND GRIGSBY

STATEMENT OF THE CASE

At the general election held in Alaska on November 5, 1918, James Wickersham, the contestant herein, was the Republican candidate, and Charles A. Sulzer was the Democratic candidate, for Delegate to Congress. Francis Connolly was the Socialist candidate, but received only a few hundred votes.

From the official count as reported by the canvassing board, Francis Connolly received 329 votes, Charles A. Sulzer 4,487 votes, James Wickersham 4,454 votes. Sulzer's plurality 33.

Before the canvassing board had completed the canvass and announced the result, and on April 15, 1919, Charles A. Sulzer died. The canvassing board completed the canvas and declared the result on April 17, 1919. and issued a certificate of election certifying the election of Charles A. Sulzer, which certificate was duly filed with the Clerk of the House of Representatives.

The Legislature of Alaska passed an act providing for a special election to fill the vacancy caused by the death of Mr. Sulzer. This act was approved on April 28, 1919. Under this act the governor called a special election, which was held on June 3, 1919, at which special election James Wickersham was not a candidate, and George B. Grigsby received a majority of the votes cast, and the canvassing board on June 14, 1919, issued a certificate of election to George B. Grigsby, the contestee herein, which certificate was filed on July 1, 1919, and he was sworn in and took his seat in the House of Representatives as such Delegate from Alaska on said date.

After the death of Charles A. Sulzer, and after the certificate of election had been issued to him, James Wickersham, the contestant, on May 3, 1919, filed notice of contest with the Clerk of the House, and under this notice took some ex parte testimony in the case. Contestant also about June 23, 1919, served notice of contest on Mr. Grigsby, notifying him of his intention to contest the special election of June 3 and also the election of Sulzer on November 5, 1918.

The Committee on Elections, finding the testimony taken by contestant was ex parte, it therefore could not consider such evidence in the case. On account of the death of Sulzer and the contestant being unable to comply with the statute relative to notice and the taking of testimony on the 28th day of July, 1919, the House of Representatives passed a consolidating reso-

lution extending the time for taking testimony for 90 days from the date of passing the resolution, and providing the manner of giving notice and taking the testimony, substituting George B. Grigsby in all necessary respects for Charles A. Sulzer, deceased, in this contest.

On July 28, 1919, Mr. Dowell, by direction of the Committee on Elections No. 3, called up the following resolution:

*Resolved,* (1) That the time for taking testimony in the contested-election ease from Alaska, James Wickersham, contestant, wherein the contestee, Charles A. Sulzer, died on April 15, 1919, two days before the issuance of the certificate of election to said Sulzer, be, and the same is hereby, extended for 90 days from the date of the passage of this resolution; (2) that contestant, Wickersham, shall have the first 40 days thereof in which to take his testimony, which shall be taken in the manner provided by the present statutes governing the taking of testimony in contested-election eases by notice served on George B. Grigsby, the successful candidate in the special Alaska election of June 3, 1919; (3) said George B. Grigsby shall have the next 40 days in which to take testimony in opposition to contestant's claim to the election of November 5, 1918, and in support of his own right shall be seated by virtue of said special election; (4) the contestant, Wickersham, to have the final 10 days in which to introduce rebuttal testimony in both elections; (5) that the governor of Alaska and the custodian of the election returns and attached ballots of the election of November 5, 1918, be, and he is hereby, commanded and required forthwith to forward by registered mail to the Clerk of the House of Representatives the whole of the election returns and all attached papers and ballots of the election of November 5, 1918, for inspection and consideration as evidence by the House of Representatives in said contested-election ease, (6) and if either the contestant or the successful candidate, said George B. Grigsby, at said special election of June 3, 1919, desires the returns of that election introduced in evidence, it shall be done under the same authority and in the same manner as is provided by this resolution for securing the returns of the election of November 5, 1918; (7) that any notice which contestant would be required to serve on said Sulzer if living, to take testimony of any witness mentioned herein, or to be called to sustain any allegation in contestant's case or any other notice which contestant might be required to serve on contestee, if living, shall be served with the same legal effect on the successful candidate, said George B. Grigsby, at the said special election; (8) and any notice which the successful candidate at said special election might find necessary to serve to present his case under either of said elections may be served on contestant; (9) that the Secretary of War be, and he is hereby, requested to order by telegraph immediately on the passage of this resolution that the 40 soldiers named and whose Army status is described in the certified list, dated June 11, 1919, signed by the War Department officials, and which list is attached to the application of contestant for the passage of this resolution, be assembled at the office of the commanding officer of the United States military cable and telegraph in the towns of Valdez, Sitka, and Fairbanks, Alaska, within the 40 days' period for taking testimony by the contestant,

then to be examined under oath by contestant or his attorney or agent touching the matters and things alleged in the notice and statement of contest on file in this House and in this cause, each to state specifically which candidate he voted for; and ( 10) the testimony of all witnesses shall be reduced to writing, signed by the witness, verified, and returned to the Clerk of the House of Representatives for use in these causes in the manner provided in the laws of the United States relating to contested elections as modified by this resolution.

Reported privileged resolution [H. Res. 105 (H. Rept. No. 154)] amended and agreed to by voice vote [58 CONG. REC. 3252, 66th Cong. 1st Sess., July 28, 1919; H. Jour. 338].

Under this resolution both parties took testimony, which was fully submitted to the committee, and the committee has fully considered all of this evidence, including the arguments of counsel. The questions in this case are, first, the election on November 5, 1918, as between James Wickersham, contestant, and Charles A. Sulzer; second, the election of George B. Grigsby at the special election of June 3, 1919. The special election was to fill the vacancy caused by the death of Charles A. Sulzer, and in the event Sulzer was duly elected on the 5th of November, 1918, the question then turns to the objections contestant makes to the special election on June 3, 1919. In the event James Wickersham was elected on November 5, 1918, and not Charles A. Sulzer, there was no vacancy created by the death of Charles A. Sulzer and therefore no vacancy could be filled at the special election on June 3, 1919.

*Territory election law*, repealing the precinct residence requirement of the federal organic law, was held invalid.

*Suffrage.*—Ballots cast by precinct nonresidents were held invalid.

*Federal election law* setting the time for opening and closing of polls was held mandatory, voiding entire returns from precincts not complying.

*Federal election law* required advance notice of election official's order changing polling places within an election precinct, and noncompliance in order to disfranchise qualified voters was held grounds for rejection of entire returns from such precincts.

REJECTED BALLOTS

One of the questions involved in this contest relates to some 40 or 50 rejected ballots. The contestant contended that a proper canvass and counting of these rejected ballots should be made. The contestee made no objection to the canvass of these ballots, and the committee carefully examined and canvassed all of these ballots, which resulted in a gain to Mr. Wickersham of 2 votes and reduced the plurality of Mr. Sulzer over that of Mr. Wickersham 2 votes.

QUALIFICATIONS OF ELECTORS IN ALASKA

In 1906, on May 7, Congress passed an act governing elections in Alaska. Section 3 of this act. being section 394, Compiled Laws of Alaska 1913, reads as follows:

> Sec. 394. All male (or female) citizens of the United States 21 years of age and over who are actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election, and who have been such residents continuously for thirty days next preceding the election in the precinct in which they vote, shall be qualified to vote for the election of a Delegate from Alaska.

Under this act it is clear that no one can lawfully vote in Alaska for Delegate who is not (1) a citizen of the United States and 21 years of age; (2) an actual and bona fide resident of Alaska, and has been such resident continuously during the entire year immediately preceding the election and continuously for 30 days next preceding the election in the precinct in which they vote.

On August 24, 1912, Congress passed an act creating a legislative assembly in Alaska, and in this act changed the time of election for Delegate to Congress from August to November, and provided that "all of the provisions of the aforesaid act shall continue to be in full force and effect, and shall apply to the said election in every respect, as is now provided for the election to be held in the month of August therein."

Mr. Grigsby, as attorney general of Alaska, rendered an opinion to the Territorial governor, a member of the canvassing board, on February 12, 1919, in the following language:

> I have to advise you that the legislature in attempting to change the qualifications of voters by this act exceeded its power, the qualifications having been fixed by the act of May 7, 1906, and continued in full force and effect by the organic act or constitution of Alaska. The organic act expressly authorized the legislature to extend the elective franchise to women, but in no other way authorized the changing of the qualifications of electors by the legislature.
>
> Respectfully submitted.
>
> GEORGE B. GRIGSBY, *Attorney General.*

This, we think, is the correct interpretation of this law. The Territorial Legislature of Alaska attempted to modify this law by the enactment of a provision permitting electors to vote in any precinct in the judicial division of the Territory, thus ignoring the provisions of the congressional act which requires the actual and bona fide residence in Alaska for one year and such residence continuously for 30 days next preceding the election in the precinct in which they vote. In this respect the Territorial law is in direct conflict with the Federal statute. The Federal statute is incorporated into the

organic law of the Territory and, as stated by Mr. Grigsby as attorney general, can not be set aside by an act of the Legislature of Alaska.

The evidence discloses that 21 persons voted at the election on November 5, 1918, for Charles A. Sulzer in precincts in which they were not bona fide residents, a few of whom were not entitled to vote at all because of nonresidence or noncitizenship in the Territory, and your committee finds that 21 votes should be deducted from the total vote for Charles A. Sulzer. Your committee further finds that 11 persons voted at the election on November 5, 1918, for James Wickersham in precincts in which they were not bona fide residents, a few of whom were not entitled to vote at all because of nonresidence or noncitizenship in the Territory, and that 11 votes should be deducted from the total vote for James Wickersham, a net loss for Sulzer of 10 votes.

At the Chickaloon precinct in the third division one John Probst, a legal voter in the precinct, presented himself at the polls and offered to vote, but was informed that the election officers had taken the ballot box and books up the creek and he could not vote. If permitted to vote he would have voted for James Wickersham. The committee finds that this vote should be added to the aggregate vote for James Wickersham.

CACHE CREEK PRECINCT

In this precinct Connolly received 1 vote, Sulzer 23 votes, and Wickersham 2 votes. The contestant charges that this precinct should be thrown out because of the violation of the election laws in holding the election; that the election was opened and the ballots cast several hours before the time fixed by law for opening the polls. The testimony clearly shows that in this precinct the election was held and nearly all the voters left the precinct before the time fixed by law for opening the polls. A number of these voters testified, and while the exact time is not fixed by the witnesses, all agree that the polls were opened and the votes cast long before 8 o'clock a.m. . . .

Section 9 of the act of Congress of May 7, 1906, relating to the elections in Alaska, provides:

> Sec. 9. That the election boards herein provided for shall keep the several polling places open for the reception of votes from 8 o'clock antimeridian until 7 o'clock postmeridian on the day of election.

The testimony shows this election was held in a cabin some time near 5 o'clock in the morning, and that approximately the whole camp moved away. There was no attempt to comply with the law in the opening of the polls or in the conduct of this election.

A parallel case arose in the State of Kentucky. We refer to the case of Verney *v.* Justice (86 Ky., 596). Under the constitution of that State it is provided that "all elections by the people shall be held between 6 o'clock in the morning and 7 o'clock in the evening." This election extended over until 9 or 10 o'clock in the evening. Enough votes were received after 7 o'clock

in the evening to have changed the result. We quote from the opinion of the court, on page 601:

> The section under consideration uses the word "shall"; it is mandatory and excludes the right to hold the election earlier than 6 o'clock in the morning and later than 7 o'clock in the evening. If the language was construed as directory merely, the election might not only be continued until 9 or 10 o'clock at night but all next day and the day after, and on and on, unless the courts in the exercise of a discretion should limit it and thus make a constitutional provision in disregard of the one made by the people for the government of election.
>
> For these reasons it is clear that the votes cast after 7 o'clock in the evening for the appellant were illegal, and that the circuit court did right in excluding them.

We also refer to Tebbe *v.* Smith (41 Pac. (Cal.), 454).

The section of the act of Congress above referred to, which is the constitution and fundamental law of the Territory of Alaska, is alike in its provisions with the constitution of the State of Kentucky.

Your committee therefore finds that the votes cast in this precinct should not be counted in the canvass of votes for Delegate at this election. In this precinct 23 votes should be deducted from the total of the votes received by Charles A. Sulzer, 2 votes should be deducted from the total received by James Wickersham, and 1 vote should be deducted from the total vote received by Mr. Connolly, a net loss for Sulzer of 21 votes.

### FORTY MILE DISTRICT

The contestant charges that in the Forty Mile district there was an official suppression of the election in certain precincts in the district in the interest of Mr. Sulzer, whereby the contestant lost some 20 votes. The testimony discloses that prior to the election in 1918 there were five voting precincts in this district, known as the Jack Wade precinct, Steel Creek precinct, Franklin precinct, Chicken precinct, and Moose Creek precinct. That about October 1, 1918, Commissioner Donovan, of the district, made an order redistricting the district into three voting precincts, to wit, Franklin, Chicken, and Moose Creek, thereby abolishing the Jack Wade and Steel Creek voting precincts in the district, or rather merging these precincts into the other three precincts, and it is charged that this was done for the purpose and that it had the effect of placing the voting precincts at such great distances from the voters that the voters in the Jack Wade and Steel Creek precincts, by reason of the great distance, were unable to reach the polls and to cast their ballots at the election. The authority and duty of the commissioner in providing voting precincts in the various election districts is defined in section 5 of the act of Congress of May 7, 1906, and is as follows:

> Sec. 5. That all of the territory in each recording district now existing or hereafter created situate outside of an incorporated town shall, for the purpose of this act, constitute one election dis-

trict; that in each year in which a Delegate is to be elected the commissioner in each of said election districts shall, at least thirty days before the date of said first election and at least sixty days before the date of each subsequent election, issue an order and notice, signed by him and entered in his records in a book to be kept by him for that purpose, in which said order and notice he shall—

First. Divide his election district into such number of voting precincts as may in his judgment be necessary or convenient, defining the boundaries of each precinct by natural objects and permanent monuments or landmarks, as far as practicable, and in such manner that the boundaries of each can be readily determined and become generally known from such description, specifying a polling place in each of said precincts, and give to each voting precinct an appropriate name by which the same shall thereafter be designated: *Provided, however,* That no such voting precinct shall be established with less than thirty qualified voters resident therein; that the precincts established as aforesaid shall remain as permanent precincts for all subsequent elections, unless discontinued or changed by order of the commissioner of that district.

Second. Give notice of said election, specifying in said notice, among other things, the date of such election, the boundary of the voting precincts as established, the location of the polling place in the precinct, and the hours between which said polling places will be open. Said order and notice shall be given publicity by said commissioner by posting copies of the same at least twenty days before the date of said first election, and at least thirty days before the date of each subsequent election, etc.

The election of November 5, 1918, was not the first election after the passage of the act and therefore the order, under this act, must be made at least 60 days before the date of the election. The evidence, however, shows that it was made and signed on October 1, 1918, calling the election for November 5, 1918. We herewith set out a copy of the order of Commissioner Donovan with reference to this voting district:

ORDER AND NOTICE OF ELECTION TO BE HELD ON TUESDAY, NOVEMBER 5, 1918

In the office of the United States commissioner at Franklin, Alaska, fourth judicial division, in the matter of the election of a Delegate to the House of Representatives from the Territory of Alaska, one member of the Senate of the Territory of Alaska, four members of the House of Representatives of the Territory of Alaska, one road commissioner for road district No. 4.

In pursuance of an act of Congress approved May 7, 1906, entitled "An act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," I, John J. Donovan, United States commissioner, in and for the Forty Mile pre-

cinct, fourth division, Territory of Alaska, do hereby order that said recording district be, and the same is hereby, divided into the following voting precincts, the boundaries thereof defined, a polling place specified, and a notice of said election published; fixing the date of said election, and designating the said polling places as follows, and the hours between which said polling places will be open:

1. *Moose Creek precinct.*—It is ordered that the boundaries of said precinct shall be as follows: Commencing on the Forty Mile River, at the international boundary line, thence running upstream to the mouth of O'Brien Creek, including all tributaries flowing into the said Forty Mile River and Walker's Fork and all its tributaries, from the mouth of Cherry Creek upstream to the international boundary line.

2. *Franklin voting precinct.*—It is ordered that the boundaries of said precinct shall be as follows: Commencing on the Forty Mile River at the mouth of O'Brien Creek, thence running upstream and including all tributaries of the North Fork, within the boundaries of the Forty Mile precinct, and all tributaries of the South Fork upstream to the mouth of Walker's Fork, thence in an easterly direction to the mouth of Cherry Creek on said Walker's Fork and all its tributaries flowing into Walker's Fork.

3. *Chicken voting precinct.*—It is ordered that the boundaries of said precinct shall be as follows: Commencing at the mouth of Walker's Folk on the South Fork of the Forty Mile River, thence in a southerly direction, including Dennison Fork and all its tributaries, Mosquito Fork and all its tributaries, and the Tanana Basin within the boundaries of the Forty Mile precinct.

4. That the several polling places herein designated will be open for the reception of votes from 8 o'clock unto 7 o'clock p.m. on the day of said election, to wit, the 5th day of November, 1918.

Dated this the 1st day of October, 1918.

JOHN J. DONOVAN,
*United States Commissioner*
*in and for the Forty Mile Precinct,*
*Territory of Alaska.*

This order, fixing the precincts in this district, is not in compliance with the law above set forth. It was not issued and entered in his records 60 days before the date of the election and does not specify a polling place in each precinct as required by law, and does not give the location of the polling places in each precinct as provided by law.

Prior to the election on November 5, 1918, there had been five polling places in the election district as above stated. These had been established for some years and were well known to the voters. These could be changed only under the provisions of the law. In this instance the commissioner had received a letter from the clerk of Judge Bunnell, which was approved either

before or after its signing. The last clause of the letter of instructions was as follows:

> The attention of one or two commissioners is directed to section 396 of the Compiled Laws of Alaska. The law does not contemplate the establishing of voting precincts in places where many prior elections have proven that there are but five or six votes. While it is not believed that any considerable number of voters should be deprived of their franchise by reason of having no voting precinct established, yet it is a matter which should receive the careful attention of the commissioner creating the same.
>
> Respectfully,
>
> J. E. CLARK, *Clerk*.
>
> (In the District Court for the Territory of Alaska, Fourth Judicial District.)

The record in this case discloses that 20 witnesses were called who lived in the Jack Wade and Steel Creek precincts. These were citizens and lawful voters of these precincts. All of these witnesses testified they were unable to vote because it would require at least two days, and traveling a distance of some thirty-odd miles, to and returning from the voting precincts as designated by the commissioner. Three of these voters testified had they been permitted to vote they would have voted for Mr. Sulzer. One testified he would have voted the Socialist ticket. All of the others testified they would have voted for Mr. Wickersham for Delegate from Alaska. . . .

We have set out this testimony because it clearly shows that the changing of the precincts by the commissioner was not entirely in the interest of economy. The abolishing of the Jack Wade and Steel Creek precincts, the largest centers in this division both of them having post offices where the residents for miles around went for their mail, and including the territory of these precincts in other precincts, and the placing of the voting precincts at Franklin, Chicken, and Moose Creek, the latter place having only two residents, the committee believes was for the purpose of depriving the voters of Jack Wade and Steel Creek precincts from having an opportunity to cast their votes. This action of the commissioner, as shown by the record, was in violation of law and did deprive 20 legal voters from casting their votes at the election.

These 20 voters had a legal right to vote and should have been permitted to vote and could have voted had the commissioner conducted the election in compliance with the law. Had they been permitted to vote, Connolly would have received 1 additional vote, Sulzer 3 additional votes, and Wickersham 16 additional votes, in the two precincts abolished and absorbed into the other precincts. If these votes are counted 1 vote should be added to the aggregate vote for Connolly, 3 votes to the aggregate vote for Sulzer, and 16 votes to the aggregate vote for Wickersham.

However, the committee finds that the whole action of the commissioner in the Forty Mile district in redistricting said district on the 1st day of Octo-

ber, 1918, was in violation of the law and this action of the commissioner did deprive at least 20 legal voters from casting their ballots at said election, and said action was without authority or jurisdiction.

It is the judgment of the committee that the votes cast in said entire district, which includes the precincts of Chicken, Franklin, and Moose Creek, were illegal and should be rejected. . . .

Your committee therefore finds that from the aggregate vote of Connolly there should be deducted 3 votes; from the aggregate vote of Sulzer there should be deducted 23 votes; and from the aggregate vote of Wickersham there should be deducted 13 votes, a net loss to Sulzer of 10 votes.

*Sufferage.*—Ballots cast by Indians born in territory and severed from tribe were held valid, whereas ballots cast by military personnel involuntarily stationed in territory were held invalid.

*Returns* were rejected by proportional deduction method where there was no evidence for whom unqualified voters had cast ballots.

Majority report for contestant, who was seated.

Minority report (unprinted) for contestee, who was unseated as his predecessor had not been elected.

THE INDIAN VOTE

It is contended by both parties that in certain precincts the votes of a number of Indians should not have been counted. The contestant claims, and with much force, that in a number of precincts where Indians voted and the majorities were for the contestee, the Indians were not entitled to vote, because they had not severed their tribal relations and were not citizens in the sense that they were qualified electors. The contestee claims that at certain other precincts, where the majorities were for the contestant, a portion of the vote being that of Indians was not legal for like reasons.

This identical question arose in the former case in the Sixty-fifth Congress, and the House, following the report of the committee, disposed of this question and did not exclude the Indian vote. Your committee believes it should follow the ruling of the House in the former case, and not disturb this vote.

THE SOLDIER VOTE

The question of the soldier vote in Alaska was determined by the committee and afterwards by the House in the Sixty-fifth Congress in the case of Wickersham *v.* Sulzer. This case having been so carefully investigated and so well considered, having the unanimous endorsement of the former committee and a large majority of the House, this committee has considered the question settled, and in view of the fact that this case was determined so recently, we have used that decision as the law in this case, and have followed it.

In the case under consideration the evidence shows that 44 soldiers in the United States Army, stationed in Alaska, voted for Delegate at the election

on the 5th day of November, 1918. As in the former case, each and all of the 44 voters in question in this case came to Alaska as soldiers in the United States Army. They remained in such service from the date of their arrival in Alaska up to the date of the election, and were in Alaska in such service on that date. All of them were enlisted and accepted for service in the States; and, as indicated by the record, the number of men and dates of enlistment being as follows: Eight in 1917, 2 in 1916, 5 in 1915, 6 in 1914, 6 in 1913, 2 in 1912, 2 in 1911, 1 in 1909, 2 in 1908, 1 in 1907, 3 in 1903, 1 in 1899, 1 in 1898, 4 in ____, of whom there were 6 from Washington State; 3 each from Minnesota, California, and New York; 2 each from Texas, Illinois, Oklahoma, Kentucky, Louisiana, and Missouri; and 1 each from Georgia, Ohio, Virginia, West Virginia, Montana, South Dakota, Michigan, Kansas, Iowa, Wisconsin, and New Jersey; and 5 from States not specified.

A few of these were honorably discharged and immediately reenlisted in Alaska; and each and all of them had been in the Territory more than a year immediately preceding the date of election, and in the precinct more than 30 days immediately preceding the election day.

> If they had acquired a legal domicile in Alaska they were entitled to vote, and the vote should be counted; otherwise not. To become a citizen and a qualified elector in Alaska a bona fide residence of 1 year in the Territory and 30 days in the voting precinct is required.

This is the rule laid down in the former case and under this rule the House excluded all of this vote.

Of the soldier vote in the 1918 election, Wickersham received 5 votes, Sulzer received 24 votes, and 16 of them refused to testify for whom they voted, or evidence was not presented to show for whom they voted. Of the votes of the ones where the testimony shows for whom they voted, there should be deducted from the total vote of Wickersham 5 votes, and from the total vote of Sulzer 24 votes, a net loss to Sulzer of 19 votes.

Of the 16 votes cast, where the evidence does not disclose for whom they voted, 11 voted in the Valdez precinct, and can be apportioned under the rule laid down in the former case of Wickersham *v.* Sulzer. . . .

The other 4 votes, where the evidence does not disclose for whom they voted, were east in the Valdez Bay precinct and can be apportioned under this same rule.

In the Valdez Bay precinct Connolly received 1 vote, Sulzer received 24 votes, and Wickersham received 11 votes.

With a deduction made on this same basis of apportionment 1 should be deducted from the total vote of James Wickersham and 3 votes should be deducted from the total vote of Sulzer, a net loss to Sulzer of 2 votes.

Readjusting the entire vote in accordance with the findings of the committee, the result finally established is:

| | |
|---|---|
| Wickersham | 4,422 |
| Sulzer | 4,385 |
| Wickersham's plurality | 37 |

For the reasons assigned herein, your committee recommends to the House the adoption of the following resolution:

*Resolved,* That Charles A. Sulzer was not elected a Delegate to the House of Representatives from the Territory of Alaska in this Congress, and George B. Grigsby, who is now occupying the seat made vacant by the death of said Sulzer, is not entitled to a seat herein.

*Resolved,* That James Wickersham was duly elected a Delegate from the Territory of Alaska in this Congress, and is entitled to a seat herein.

Minority views were submitted by Mr. C. B. Hudspeth, of Texas, and Mr. James O'Connor, of Louisiana, but were not printed to accompany the committee report. The minority dissented from each conclusion reached in the majority report. Their recommended resolution, offered as a substitute for the resolution called up by the majority, provided:

> *Resolved,* That James Wickersham was not elected a Delegate to the Sixty-sixth Congress from the Territory of Alaska, and is not entitled to a seat in said Congress.
>
> *Resolved,* That Charles A. Sulzer was duly elected a Delegate from the Territory of Alaska to the Sixty-sixth Congress, and that said Charles A. Sulzer having died, and George B. Grigsby having been elected at a special election as a Delegate from the Territory of Alaska, and having been sworn in as a Member of the House of Representatives on July 1, 1920, that the said Grigsby is entitled to retain his seat therein.

The unnumbered resolution recommended by the majority report (H. Rept. No. 1319) declaring contestant elected at the general election and declaring contestee not entitled to retain his seat (as his predecessor had not been elected at the general election), was submitted by Mr. Dowell on Feb. 28, 1921. Mr. Hudspeth thereupon offered a substitute amendment declaring contestant not elected and declaring contestees to have been elected. Debate was extended to three hours by unanimous consent, to be equally divided and controlled by Mr. Dowell and Mr. Hudspeth. On Mar. 1, 1921, when the resolution was further considered, the substitute amendment was divided for the vote, the first part rejected 169 yeas to 179 nays with 10 "present," and the second part rejected 162 yeas to 179 nays with 5 "present." After a motion to recommit the report and resolutions to the Committee on Elections No. 3 was rejected 169 yeas to 188 nays with 3 "present," the resolution was divided for the vote, the first part being agreed to 182 yeas to 162 nays with 9 "present," and the second part being agreed to 177 yeas to 163 nays with 10

"present" [60 CONG. REC. 4189, 66th Cong. 3d Sess., Mar. 1, 1921; H. Jour. 275–278].

**§ 2.7 Farr v McLane, 10th Congressional District of Pennsylvania.**

*Federal Corrupt Practices Act.*—Violation by contestee's campaign committee of the limitation on contributions to a candidate was held attributable to contestee and sufficient grounds for unseating contestee.

Report of Committee on Elections No. 1 submitted by Mr. Frederick W. Dallinger, of Massachusetts, on Feb. 15, 1921, follows:

Report No. 1325

CONTESTED ELECTION CASE, FARR v MCLANE

At the election held in the tenth congressional district of the State of Pennsylvania on November 5, 1918, according to the official returns, Patrick McLane, the contestee, who was the Democratic candidate, received 11,765 votes and John R. Farr, the contestant, who was the Republican candidate, received 11,564 votes. As a result of these returns, Patrick McLane, the contestee, was declared elected by a plurality of 201 votes over his Republican opponent, John R. Farr, and a certificate of election was duly issued to him by the secretary of state of Pennsylvania. . . .

VIOLATION OF THE CORRUPT-PRACTICES ACT

The act of Congress approved August 19, 1911 (37 Stat. L., 33), commonly known as the "corrupt-practices act," provides as follows:

> Every person who shall be a candidate for nomination at any primary election or nominating convention, or for election at any general or special election, as Representative in the Congress of the United States, shall, not less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which candidates for Representatives are to be elected, file with the Clerk of the House of Representatives at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions,

> payments, or promises were made, for the purpose of procuring his nomination or election. . . .
>
> No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides: Provided, That no candidate for Representative in Congress shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding $5,000 in any campaign for his nomination and election; and no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding $10,000 in any campaign for his nomination and election: Provided further, That money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or for his necessary personal expenses, incurred for himself alone, for travel and subsistence, stationery and postage, writing or printing (other than newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within the meaning of this section, and shall not be considered any part of the sum herein fixed as the limit of expense and need not be shown in the statements herein required to be filed.

The evidence shows that on December 5, 1918, Patrick McLane filed a personal return of his campaign expenses showing total receipts of $275 and total expenditures or disbursements of $748.04.

On the same date George Hufnagel, treasurer, filed a return in behalf of the "McLane Campaign Committee" showing total receipts of $12,800 and total expenditures of $11,749. Under the head of "Expenditures or disbursements" occurs this item:

> November 3, P. J. Noll, secretary Democratic county committee, $6,000.

On December 2, 1918, Albert Gutheinz, treasurer of the Democratic county committee of Lackawanna County, which county is situated in the tenth congressional district of the State of Pennsylvania, filed a return with the Clerk of the House of Representatives showing total receipts of $10,195 and total expenditures or disbursements of $7,476.96 and unpaid debts and obligations of $158.79. At the top of this return, the original of which was examined by the committee, appears the following statement:

> I hereby certify that the following is a full, correct, and itemized statement of all moneys and things of value received by me as treasurer of the Democratic county committee of Lackawanna County, Pa., together with the names of all those who have furnished the same, in whole or in part, *in aid or support*

> *of the candidacy of Patrick McLane for election as Democatic Representative in the Congress of the United States for the tenth congressional district of the State of Pennsylvania* at the general election to be held in said district on the 5th day of November, 1918. [The italics are the committee's.]

It is evident, therefore, that in spite of the fact that Congress by statute has expressly forbidden any candidate for Representative in Congress to expend more than $5,000 in any campaign for his nomination and election, after deducting $6,000 which was received by the McLane campaign committee and paid by it to the Democratic county committee of Lackawanna County and expended by the latter, and also deducting the amount of $760.75 expended for purposes for which no return is required by the Federal statute, there was expended in the interest of the contestee, Patrick McLane, $7,853.49 in excess of the statutory amount. But omitting entirely the expenditures of the Democratic county committee, the "McLane Campaign Committee" alone, which was organized solely for the purpose of promoting the election of the contestee, Patrick McLane, spent $11,749, the whole amount of which, with the exception of items aggregating $292.50, was expended for purposes for which, if expended by the candidate himself, a return is required to be made by the Federal law.

It was contended by the contestee, Patrick McLane, that he had not violated the corrupt practices act, because he personally had expended only $748.04 and that the balance of the money was expended by a committee of which he claims that he had no knowledge. If his contention is correct then the corrupt practices act becomes a farce and the limitation placed by Congress upon campaign expenditures is meaningless. The reading of the entire statute clearly shows that it was the intent of Congress to prohibit a candidate for Congress from expending directly or indirectly more than $5,000 for his nomination and election.

In the contested election case of Gill *v.* Catlin [Moore's Digest of Contested Election Cases, 1901–1917, p. 521 from the eleventh district of the State of Missouri, in the second session of the Sixty-second Congress, where the contestee pleaded that he had no knowledge of any money being expended in his behalf outside of what he spent personally, it was held that he had constructive notice from the fact that he must have known as a reasonable man that money was being spent in his interests. In the present case, the testimony is plain that the contestee, Patrick McLane, had actual notice of the fact that money was being spent by his committee in his interests and that he was even shown copies of the advertisements which were inserted in the Scranton newspapers in his behalf.

The committee therefore finds that the contestee, Patrick McLane, must under the law be held to have had constructive knowledge of expenditures made in excess of the amount permitted under the corrupt practices act. For that reason, in accordance with congressional precedent and as a matter of principle, he is not entitled to his seat in the Sixty-sixth Congress.

*Fraud* was sufficient to justify total rejection of returns in precincts where election officials illegally changed polling places,

marked ballots, and permitted double votes and the registration and balloting by unqualified or fictitious voters.

*Evidence.*—The burden of proof is on contestant to show voters unqualified, and proof of alphabetical arrangement of names in poll books is sufficient to establish fraud by election officials.

*Returns* were totally rejected in precincts where both official fraud and balloting by unqualified voters were proven, and were rejected by proportional deduction method in precincts where unregistered voters cast ballots absent official fraud.

Report for contestant, who was seated; contestee unseated.

For the sake of clearness, the contestant's charges will first be considered in detail and then the contestee's charges will be taken up in like manner.

CONTESTANT'S CHARGES OF ILLEGALITY

1. Archbald Borough, first ward, first district: Official vote—Farr 71, McLane 156. The contestant claims that in this district 37 persons were permitted by the election officers to vote who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of their registration, as required by the laws of the State of Pennsylvania.

The committee finds that giving the contestee the benefit of the doubt, which has been the policy of the committee throughout, 34 such persons were actually permitted to vote.

2. Archbald Borough, first ward, second district: Official vote—Farr 5, McLane 229. The contestant claims that in this district 30 persons whose names appear on the list of voters returned by the election officers as having voted did not, as a matter of fact, vote at the congressional election on November 5, 1918. The committee finds that this happened in 19 cases.

In the same district the contestant claims that 10 persons voted illegally, either because they had paid no tax or were aliens or minors. The committee finds that there is some conflict in the testimony and therefore gives the contestee the benefit of the doubt.

The contestant also claims that the names of seven persons were returned as having voted whose names were fictitious, as no such persons in fact existed. The committee finds considerable evidence to support this contention.

The contestant claims and the committee finds that the registry list of qualified voters belonging to this district disappeared under suspicious circumstances.

3. Archbald Borough, second ward: Official vote—Farr 18, McLane 319. The contestant claims that in this ward 18 persons who were returned by the election officers as having voted did not, as a matter of fact, vote at the congressional election on November 5, 1918. The committee finds that this was true in 12 cases. The contestant further claims that in this district 46 votes were cast by unregistered voters who had not qualified in accordance with the laws of Pennsylvania. The committee finds that 41 such persons

were permitted to vote. The contestant also claims and the committee finds that persons under age were induced to make false affidavits and then permitted to vote illegally with the full knowledge and consent of the election officials.

4. Archbald Borough, third ward: Official vote—Farr 11, McLane 190. The contestant claims that in this district 37 persons whose names appear upon the list of voters returned by the election officers of the said district as having voted did not, as a matter of fact, vote at the congressional election on the 5th day of November, 1918. The committee finds that there were 29 such cases.

The contestant also claims that 18 names on the list of voters as returned by the election officers as having voted were fictitious and that no such persons, as a matter of fact, existed. There is considerable evidence to establish this contention and, in addition the alphabetical arrangement of the names which were supposed to be entered in the poll book in the order in which the voters cast their ballots, clearly indicates the existence of fraud on the part of the election officials.

The contestant further claims that 84 persons whose names appear upon the list of voters as having voted, were not registered and were not qualified to vote under the laws of the State of Pennsylvania. The committee finds that 71 such persons actually voted.

The contestant also claims that the polling place in this district was illegally changed on election day contrary to the laws of Pennsylvania, and, that in aeeordance with the decisions of the supreme court of that State, the entire returns of that district should be thrown out. While the committee finds that the evidence and decisions strongly support this contention, this fact alone would not have caused the committee to recommend the rejection of the entire return. Considering the question, however, in connection with the evidence of fraud hereinbefore referred to, the committee is of the opinion that the entire return from this district should be rejected, as recommended hereafter.

5. Dickson City Borough, first ward: Official vote—Farr 87, McLane 182. The contestant claims that in this district 69 persons were permitted to vote by the election officers who were not legaDy qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of their registration, as required by law. The committee finds that 68 such persons were permitted to vote.

6. Dickson City Borough, second ward: Official vote—Farr 42, McLane 176. The contestant claims that the names of 23 persons appear upon the list of voters returned by the election officers of this district as having voted who did not, as a matter of fact, vote at the congressional election on November 5, 1918. The committee finds that this was true in at least 10 instances. The committee also finds that the alphabetical arrangement of the names in the poll book constitutes strong circumstantial evidence of collusion and fraud on the part of the election officers. The contestant further claims and the committee finds that 10 persons were allowed to cast their ballots in this district who were not on the voting list and who were not qualified according to the laws of the State of Pennsylvania.

7. Dickson City Borough, third ward: Official vote—Farr 28, McLane 191. The contestant claims that in this district 59 persons were permitted to vote by the election officers who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of their registration, as required by law. The committee finds that 50 such persons were actually permitted to vote.

8. Dunmore Borough, first ward, second district: Official vote—Farr 17, McLane 127. The contestant claims that in this district the election officers returned for the office of Representative in Congress 16 more votes than were actually cast. The committee finds that the testimony and the exhibits substantiate this contention. The contestant also claims that 54 of the 128 voters who, according to the poll book, did vote, were not on the voting list and did not qualify on election day as required by law. The committee finds that this was the fact in 50 oases.

9. Dunmore Borough, first ward, third district: Official vote—Farr 53, McLane 119. The contestant claims that in this district persons were openly permitted to vote who were not citizens of the United States, although they told this fact to the election officers, and that their ballots were marked for them by these officials. The committee finds that the testimony clearly shows that this was the fact, as the following extract from the record shows. . . .

The contestant also claims and the committee finds that in this district 10 persons were permitted to vote by the election officers who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of their registration, as required by law.

10. Dunmore Borough, second ward, first district: Official vote—Farr 12, McLane 105. The contestant claims that in this district 19 persons were permitted to vote by the election officers who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of their registration, as required by law. The committee finds that 18 such persons were permitted to vote.

11. Dunmore Borough, second ward, second district: Official vote—Farr 21, McLane 140. The contestant claims that in this precinct 5 persons whose names appear upon the list of voters as having voted did not, upon their own testimony, vote at the congressional election on November 5, 1918. The committee finds that the evidence clearly shows that this was true in 4 cases. The committee also finds, as contended by the contestant, that 3 persons not citizens of the United States were permitted to vote, and that the election officers in this district knowingly accepted the votes of such persons.

The contestant further claims that in this district 38 persons were permitted to vote by the election officers who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of their registration, as required by law. The committee finds that 29 such persons were permitted to vote.

12. Dunmore Borough, fourth ward: Official vote—Farr 2, McLane 50. The contestant claims, and the committee finds, that in this precinct one person was returned as having voted who did not, in fact, vote according to his own

testimony. The contestant further claims that 12 unnaturalized aliens were permitted to vote and in many cases were urged to vote and their ballots marked by the election officers. The committee finds that this contention is supported by the evidence.

13. Olyphant Borough, third ward, first district: Official vote—Farr 38, McLane 161. The contestant claims that in this precinct 5 persons were returned as having voted by the election officers who did not, as a matter of fact, vote, owing to the fact that they were fighting overseas or had died. The committee finds that this was the fact. The testimony also shows that, in this precinct the names of fictitious persons were repeatedly voted on, and that 7 unnaturalized aliens were permitted to cast their votes.

The contestant further claims that in this district 85 persons were permitted to vote by the election officers who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of their registration as required by law. The committee finds that according to the evidence 83 such persons were permitted to vote.

14. Olyphant Borough, fourth ward: Official vote—Farr 112, McLane 135. The contestant claims that in this district the regularly elected judge of election being sick and unable to attend, neither of the methods provided by the laws of Pennsylvania for the appointment of a substitute judge of election was followed, but that a young man named Joseph Onze, who, according to his own testimony, was not legally entitled to vote himself on account of the nonpayment of taxes, was sworn in and conducted the election. The contestant also claims that in this district 237 votes were returned for the office of Congressman, whereas only 204 votes were cast in the ward; and also that there were 52 fraudulent ballots deposited in the ballot box.

The contestant also claims that 6 persons whose names appeared on the list of voters as having voted did not, as a matter of fact, vote at the congressional election on November 5, 1918; that 2 persons were permitted by the election officers to vote who, according to their own testimony, were aliens, and 2 who had not paid taxes as required by law.

The committee finds that all of these allegations are substantiated by the evidence.

The contestant further claims that in this district 43 persons were permitted to vote by the election officers who were not legally qualified to vote because they had not registered and did not make affidavits of their right to vote in the absence of their registration as required by law. The committee finds that 38 such persons were permitted to vote.

15. Lackawanna Township, first district: Official vote—Farr 11, McLane 239. The contestant claims that in this district 20 persons whose names appear on the list of voters returned by the election voters as having voted did not, as a matter of fact, vote at the congressional election on November 5, 1918. The committee finds that the testimony clearly shows that this happened in 19 cases. The contestant further claims that in this district the list of voters was falsified by the election officers, as shown by the testimony; that 71 voters must have cast their ballots at the same time, notwithstanding there were only five voting booths in the polling place, and that 7 persons were permitted to vote twice at the election. The committee finds

that these contentions are substantiated by the testimony. The contestant also claims that four persons were permitted to vote, one of whom was an alien and three who had paid no taxes in violation of the laws of the State of Pennsylvania. The committee finds that the evidence shows that three of the four persons mentioned clearly voted illegally.

The contestant also claims that in this district 51 persons were permitted to vote by the election officers who had not registered and did not make affidavit of their right to vote in the absence of their registration, as required by law. The committee finds that 47 such persons were permitted to vote.

The committee further finds that in this district, as in other districts, persons who were not citizens of the United States were told that everybody who was registered in the draft could vote, and that many such persons were permitted to vote.

16. Lackawanna Township, second district: Official vote—Farr 7, McLane 106. The contestant claims that in this district 14 persons who were not citizens of the United States were permitted by the election officials to vote and that in case of many of them their ballots were marked and deposited in the box by outside "workers" acting in collusion with the election officials. The committee finds that this contention is borne out by the evidence. The contestant also claims that in this district 19 persons were permitted to vote by the election officers who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of such registration, as required by law. The committee finds that 9 such persons were actually permitted to vote.

17. Winton Borough, second ward: Official vote—Farr 16, McLane 196. The contestant claims that in this district 68 persons were permitted to vote by the election officers who were not legally qualified to vote, because they had not registered and did not make affidavit of their right to vote in the absence of registration, as required by law. The committee finds that 61 such persons were actually permitted to vote.

18. Winton Borough, third ward: Official vote—Farr 16, McLane 184. The contestant claims that in this district 118 persons were permitted to vote by the election officers who were not legally qualified to vote, because they had not registered and did not make proof of their right to vote in the absence of such registration, as required by law. The committee finds that 110 such persons were permitted to vote.

19. Fell Township, third district: Official vote—Farr 19, McLane 76. The contestant claims that in this district 40 persons were permitted to vote by the election officers who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of their registration, as required by the law. The committee finds that 36 such persons were permitted to vote.

20. Throop Borough: Official vote—Farr 108, McLane 251. The contestant claims that in this district 59 persons were permitted to vote by the election officers who were not legally qualified to vote because they had not registered and did not make affidavit of their right to vote in the absence of registration, as required by law.

The committee finds that 57 such persons were actually permitted to vote.

CONTESTEE'S CHARGES OF ILLEGALITY

1. Carbondale: Official vote—Farr 1,016, McLane 799. The contestee claims in his brief that in certain wards in the city of Carbondale the names of 77 persons were added to the voting list by the board of county commissioners of Lackawanna County on sworn petitions presented by one Ralph Histed without the persons in question having personally appeared before the board, on the ground that they were prevented by sickness or necessary absence from the city, when, as a matter of fact, they were not so prevented.

The result of the committee's inquiry by wards is as follows:

Carbondale, first ward, first district: The contestee claims that 27 votes were cast by persons illegally registered. Of these 19 were summoned and testified.

The committee finds that 13 of these were illegally registered, of whom 7 testified that they voted for John R. Farr for Congress, 1 testified that he voted for Patrick McLane, and the other 5 refused to disclose for whom they voted.

Carbondale, second ward, first district: The contestee claims that in this district 6 persons were permitted to vote who were improperly registered. Of this number 5 were summoned and testified.

The committee finds that 4 of these persons were illegally registered, of whom 3 voted for John R. Farr for Congress and 1 refused to disclose for whom he voted.

Carbondale, third ward, fourth district: The contestee claims that 20 voters were permitted to vote whose registration was illegal. Of this number 16 were summoned and testified.

The committee finds that 15 of the 16 were illegally registered, of whom 8 testified that they voted for John R. Farr for Congress and 7 refused to disclose for whom they voted.

Carbondale, fifth ward, first district: The contestee claims that 9 votes were cast by persons illegally registered. Of these 6 were summoned and testified. The committee finds that 3 of these persons were illegally registered, all of whom voted for John R. Farr for Congress.

Carbondale, sixth ward, first district: The contestee claims that in this district 3 persons were permitted to vote who were improperly registered. Of this number, 1 was summoned and testified, and committee finds that he was illegally registered but refused to disclose for whom he voted.

2. Blakely Borough: Official vote—Farr 587, McLane 127. The contestee claims that 21 persons were permitted to vote who were not qualified voters. The committee finds that 4 persons in this borough voted illegally, 3 of them testifying that they voted for John R. Farr, the contestant.

3. Old Forge Borough: Official vote—Farr 416, McLane 472. The contestee claims that in this borough there was intimidation and coercion of voters and that illegal votes were cast therein. The committee finds that the testimony is vague and indefinite, except as to one unnaturalized person, who was permitted to vote.

4. Taylor Borough, sixth ward, first district: Official vote—Farr 85, McLane 29. The contestee claims that the returns from this district should

be thrown out on the ground that the polls were not open at the time fixed by law and that in the absence of the regular election officers an irregular election board was chosen. The committee finds that while the polls were late in opening, the election in the district in question was carried on in good faith, and that there are no facts which would justify the committee in throwing out the vote of the district.

5. Covington Township: Official vote—Farr 86, McLane 18. The contestee claims that in this township there were 12 illegal votes cast. The committee finds that the contestee's contention is not borne out by the facts.

THE SOLDIER VOTE

The contestee also claims that the votes taken in the various military encampments and naval stations throughout the United States should be rejected and should be deducted from the totals on the ground that the returns were not in accordance with the requirements of the laws of Pennsylvania. The total soldier vote was Farr, 181; McLane, 123; there being a plurality of 58 for John R. Farr.

The State of Pennsylvania passed no new legislation providing for the voting of persons in the Army and Navy, as was the case in many of our States. Whatever voting was done was therefore held under the act of the assembly of August 25, 1864 (Public Laws, 990), which was passed during the Civil War when conditions were very different from what they were in the late war.

While it is undoubtedly true, as the contestee claims, that some camps and naval stations submitted returns which failed to comply with all the provisions of the statute, nevertheless, your committee feels that in the absence of evidence that the soldiers who voted were not otherwise disqualified to vote, it would be reluctant to disfranchise them. Inasmuch, however, as the rejection of the entire soldier vote would not alter the result arrived at by the committee upon all the other evidence in the case, it is not necessary to pass upon this question.

SUMMARY

The committee therefore finds that in the boroughs of Archbald, Dickson City, Dunmore, Olyphant, Winton, and Throop and in the townships of Lackawanna and Fell there were 1,006 illegal votes cast and counted at the congressional election on November 5, 1918. In a vast majority of these cases there is no way of ascertaining for whom these illegal votes were cast for the office of Representative in Congress. In many of these districts there is conclusive evidence of actual fraud on the part of the election officers, which would justify the rejection of the entire vote of the district in accordance with a long line of State and congressional precedents. In all of them there was a reckless disregard of the essential requirements of the Pennsylvania election laws on the part of the officers conducting the election, to such an extent as to render their returns unreliable and to bring about the same result as actual fraud.

In the case of In re Duffy (4 Brewster, 531), a Pennsylvania case, in which were involved some of the very election districts that are involved in the present case, the court held that when there is a reckless disregard of the provisions of the election law on the part of the election officers, such a condition renders the returns of the election officers unreliable and is sufficient to set them aside. If in the present case the entire vote of the districts in question should be rejected, as has been done by election committees of the House of Representatives in a large number of contested-election cases, the most recent of which was the Massachusetts case of Tague *v.* Fitzgerald in the present Congress, the result would be as follows: John R. Farr, 10,858 votes; Patrick McLane, 8,438 votes; and John R. Farr would be elected by a plurality of 2,420 votes.

If, on the other hand, the rule of deducting the illegal votes pro rata from the total vote of the two candidates, which rule was followed in the case of Finley *v.* Walls in the Forty-fourth Congress [Rowell's Digest of Contested Election Cases, 1789–1901, p. 305] and in other contested-election cases, notably, in the recent case of Wickersham *v.* Sulzer in the Sixty-fifth Congress, it would result in a deduction of 164 votes from the total vote of John R. Farr, and in a deduction of 841 votes from the total vote of Patrick McLane, which would make the result as follows: John R. Farr, 11,400; Patrick McLane, 10,924; and John R. Farr would still be elected by a plurality of 476.

After most careful consideration your committee is of the opinion that in the present case both methods should be used. While in all of the election districts in question persons were permitted to vote who had not been legally registered—in certain of the districts, namely: Archbald Borough, first ward, second district; Archbald Borough, third ward; Dickson City Borough, second ward; Dunmore Borough, first ward, second and third districts; Dunmore Borough, second ward, second district; Dunmore Borough, fourth ward; Olyphant Borough, third ward, first district; Olyphant Borough, fourth ward; and the first and second election districts of Lackawanna Township—there was in addition evidence of other fraud of various kinds, together with collusion on the part of the election officials of such a character as to destroy the integrity of the returns and to justify their absolute rejection. Accordingly, your committee has rejected the entire returns from the last-mentioned districts, in which John R. Farr received 322 votes and Patrick McLane received 1,669 votes.

Deducting these votes from the official returns gives the following result: John R. Farr, 11,242 votes; Patrick McLane, 10,096 votes. In the remaining election districts, where there was simply evidence of persons voting who were not legally registered, your committee has deducted from the total vote of the two candidates the number of illegal voters pro rata, namely, 77.71 from the vote of John R. Farr and 411.30 from the vote of Patrick McLane, with the following result: John R. Farr, 11,164; Patrick McLane, 9,685.

The committee then proceeded to deduct the 41 illegal votes found to have been cast in the city of Carbondale, Blakely Borough, and Old Forge Borough, from the total votes of the candidates where the evidence showed for whom the person voted, and to deduct the balance pro rata, with the final

result as follows: John R. Farr, 11,131; Patrick McLane, 9,677 votes; or a plurality of 1,454 votes for John R. Farr.

CONCLUSION

The evidence in this case, therefore, clearly shows that the contestee, Patrick McLane, must under the law be held to have had constructive knowledge of expenditures made in excess of the amount permitted under the corrupt practices act, and for that reason, in accordance with congressional precedent, he is not entitled to a seat in the Sixty-sixth Congress.

Moreover, entirely apart from the unlawful expenditure of money incurred to secure the election of the contestee, there was widespread fraud and illegality in the election itself. The rejection of the entire vote of the election districts in which such fraud and illegality occurred, in accordance with a long line of congressional and State precedents, results in the election of John R. Farr, the contestant, by a plurality of 2,420 votes. Without, however, rejecting any election districts, the subtraction of the illegal votes pro rata from the total vote of the contestant and the contestee, respectively, in accordance with the practice followed in some contested election cases in past Congresses, results in the election of John R. Farr, the contestant, by a plurality of 476 votes. Following the plan adopted by your committee of rejecting the entire vote of those election districts in which there occurred both fraud and illegality and deducting the illegal votes pro rata from the total vote of each candidate in these districts where there was only evidence of the voting of persons not legally registered, the result is still the election of John R. Farr, the contestant, by a plurality of 1,454 votes. No matter what plan is adopted, the rejection of the entire soldier vote would not alter the result.

Your committee therefore respectfully recommends to the House of Representatives the adoption of the following resolutions:

> *Resolved,* That Patrick McLane was not elected a Member of the House of Representatives from the tenth congressional district of the State of Pennsylvania in this Congress and is not entitled to retain a seat herein.
>
> *Resolved,* That John R. Farr was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Pennsylvania in this Congress and is entitled to a seat herein.

After debate in the House on Feb. 25, 1921, Mr. James V. McClintic, of Oklahoma, offered the following motion to recommit:

> *Resolved,* That the report in the Farr against McLane contested case be recommitted to the Committee on Elections No. 1, with instructions to examine the tally sheets and the registration lists in the 32 boxes impounded by a court order under date of April 5, 1919, on the prayer of the contestee, and to report back

to the House when all of the testimony and facts have been properly considered.

Reported privileged resolution (H. Res. 697) divided for vote, first part agreed to (161 yeas to 113 nays with 4 "present" and second part agreed to (158 yeas to 106 nays with 5 "present") after debate and after rejection (120 yeas to 161 nays with 2 "present") of motion to recommit report [60 CONG. REC. 3899, 66th Cong. 3d Sess., Feb. 25 1921; H. Jour. 253, 254].

## § 3. Sixty-seventh Congress, 1921–23

### § 3.1—Memorial of John P. Bracken, At Large, Pennsylvania.

*Member-elect's* death prior to certification was held not to entitle an unsuccessful candidate, receiving the highest number of votes of all unsuccessful candidates at large, to the seat.

Report recommending memorialist not entitled to seat.

Report of Committee on Elections No. 2 submitted by Mr. Robert Luce, of Massachusetts, on July 14, 1921, follows:

Report No. 265

MEMORIAL OF JOHN P. BRACKEN

The Committee on Elections No. 2, to which was referred the memorial of John P. Bracken, a citizen of Pennsylvania, claiming to have been elected to the House of Representatives of the Sixty-seventh Congress, reports as follows:

Upon the canvass of votes east in the State of Pennsylvania November 2, 1920, Hon. Mahlon M. Garland was declared to have been elected as one of the four Representatives at large in Congress from that State. Before the completion of the canvass Mr. Garland died. Mr. Bracken received the highest vote given to any candidate not declared to have been elected. In the judgment of your committee this state of facts does not warrant the conclusion that Mr. Bracken was elected, and therefore the committee recommends the passage of the following resolution:

> *Resolved*, That John P. Bracken was not elected a Representative at large to the Sixty-seventh Congress from the State of Pennsylvania.

Reported privileged resolution (H. Res. 204) agreed to by voice vote after brief debate [61 CONG. REC. 6564, 67th Cong. 1st Sess., Oct. 20. 1921; H. Jour. 494].

**§ 3.2 Bogy v Hawes, 11th Congressional District of Missouri.**

*Pleadings.*—Failure of contestant to comply with an elections committee rule requiring filing of an abstract of evidence with his brief did not preclude committee's consideration of the merits of the contest.

*Evidence* taken ex parte by contestant is not admissible.

*Evidence* offered by contestant to support allegations of fraud and irregularities was insufficient to void returns.

Report of Committee on Elections No. 1 submitted by Mr. Frederick W. Dallinger, of Massachusetts, on July 21, 1921, follows:

Report No. 281

CONTESTED ELECTION CASE, BOGY V HAWES

STATEMENT OF THE CASE

At the election held in the eleventh congressional district of the State of Missouri on November 2, 1920, according to the official returns, Harry B. Hawes, the contestee, who was the Democratic candidate, received 35,726 votes and Bernard P. Bogy, the contestant, who was the Republican candidate, received 33,592 votes. As a result of these returns, Harry B. Hawes, the contestee, was declared elected by a plurality of 2,134 votes over his Republican opponent, Bernard P. Bogy, and a certificate of election was duly issued to him by the secretary of state of Missouri.

On December 18, 1920, the contestant, Bernard P. Bogy, in accordance with law, served on the contestee a notice of contest in which was set forth 27 separate grounds of contest, alleging false registration, wrongful and fraudulent counting of ballots, and intimidation of voters at the congressional election. Summarizing the numerous allegations in his notice of contest, the contestant claims that 31,125 votes were improperly and illegally east for the contestee and that if the votes thus illegally and improperly counted and accredited to the contestee, Harry B. Hawes, were deducted, the contestant, Bernard P. Bogy, would be shown to have been fairly elected.

To this notice of contest the contestee, Harry B. Hawes, on December 20, 1920, served on the contestant, Bernard P. Bogy, an answer denying all the allegations contained in the contestant's notice.

The contestee took no testimony in his own behalf before the notary public, contenting himself with a long and exhaustive cross-examination by himself and his counsel of the witnesses summoned by the contestant. He contended both in his brief and in his argument before your committee that the contestant has utterly failed to prove the allegations contained in his notice of contest.

WORK OF THE COMMITTEE

The testimony in the case having been printed and printed briefs having been duly filed with the committee by both parties, a hearing was given to

the parties by your committee on Wednesday, July 13, 1921, at which oral arguments were presented by both the contestant and the contestee, neither of them being represented by counsel at the hearing. Since the close of the hearing the committee has examined the record, the briefs, and the stenographer's report of the hearing and given the ease careful consideration.

In order to expedite the disposition of contested election cases the three Committees on Elections at the beginning of the present session of Congress revised the rules of the committees and adopted a new rule known as rule 3, which reads as follows:

> Rule 3. Each contestant shall file with his brief an abstract of the record and testimony in the case. Said abstract shall, in every instance, cite the page of the printed testimony on which each piece of evidence referred to in his abstract is contained. If the contestee questions the correctness of the contestant's abstract, he may file with his brief a statement setting forth the particulars in which he takes issue with the contestant's abstract, and may file an amended abstract setting forth the correct record and testimony.

Copies of the new rules were sent to both the contestant and the contestee in the present case. The contestant, however, entirely ignored this rule and did not file with his brief an abstract of the record and testimony in the case, although the contestee did comply with it. As a result, the committee was obliged to read the entire record, which was full of a very large amount of irrelevant matter. Under the circumstances, the committee might well have defaulted the contestant for noncompliance with the rules of the committee. Inasmuch, however, as this was the first Congress in which this rule has been in operation, the committee has been inclined to be lenient and has considered the case in all its bearings as fully as if the rule had been complied with.

In connection with this subject, the committee desires to call the attention of the House to H.R. 7761, unanimously reported by this committee on July 16 of the present year, being No. 115 on the Union Calendar, and now on Calendar for Unanimous Consent, which incorporates the substance of this rule in the law governing contested election eases.

FINDINGS OF FACT

In support of most of the allegations contained in his notice of contest, the record shows that the contestant offered no evidence or testimony whatever. In the case of the few allegations in which he submitted testimony, it is in most cases unsatisfactory and unconvincing, as a reading of the examination and cross-examination of the witnesses in the record will show.

As an example of the lack of evidence in this case, the committee desires to call attention to the twenty-fourth count in the contestant's notice of contest, where he alleges that there were in the eleventh congressional district about 2,000 cases of illegal registration, the votes of all such illegally registered persons having been cast for the contestee. Then follows a list of

about 450 names and addresses of persons alleged to be improperly registered. In support of this alleged wholesale illegal registration and voting, no evidence or testimony whatever was offered by the contestant at any time. At the hearing before your committee the contestant offered a sworn affidavit of a lieutenant of police of the city of St. Louis, stating that on March 26, 1921, prior to the city election, he was detailed by the board of police commissioners to investigate false registration in certain wards of St. Louis, and that he compared his canvass of certain precincts in the eleventh congressional district with the registration lists furnished by the board of election commissioners, and that he estimated that there were between 1,000 and 1,200 false registrations in the eleventh congressional district at that time. Inasmuch as this affidavit was entirely ex parte and no opportunity was given to the contestee to cross-examine the witness, your committee very properly excluded it in common with several other similar affidavits. This affidavit, like the other excluded affidavits, however, had no probative value or any bearing upon the present contest, as there was no evidence whatever that any of the alleged false registrants voted at the congressional election on November 2, 1920.

### CONDUCT OF THE ELECTION

The contestant, Bernard P. Bogy, was a candidate for the Republican nomination for Congress in the eleventh Missouri district at the primary election held August 3, 1920, but was defeated by Otto F. Stifel by a vote of 8,296 to 1,944. After the primary and before the election, Otto F. Stifel died and the contestant, Bernard P. Bogy, was given the Republican nomination by the Republican congressional committee. The adoption of the nineteenth amendment to the Constitution of the United States, granting the right of suffrage to women, resulted in an increase in the number of registered voters in the eleventh congressional district of Missouri from 44,670 in 1916 to 79,356 in 1920. In the year 1916 the total vote cast by both the Republican and Democratic candidates for Congress was 41,462, while in the year 1920 the combined vote of the contestant and the contestee was 69,318. To meet this tremendous increase in the number of registered voters only 23 additional polling places were provided by the authorities of St. Louis, resulting in a very great congestion at the polls on election day. In spite of this congestion, however, the election was, on the whole, quiet and orderly, there being very few complaints made to the board of election commissioners.

The election was in charge of the Board of Election Commissioners of the city of St. Louis, which is a bipartisan board composed of two Democrats and two Republicans appointed by the governor of the State and confirmed by the State senate. The clerks in the office of the board of election commissioners are equally divided between Republicans and Democrats, the Republican clerks being selected by the Republican commissioners and the Democratic clerks being selected by the Democratic commissioners. At each of the 155 voting precincts of the eleventh congressional district there were present on election day two Republican and two Democratic judges of election and one Republican and one Democratic clerk, all of these officials being ap-

pointed by the board of election commissioners, the Republican officials being appointed by the two Republican commissioners and the Democratic officials being appointed by the two Democratic commissioners. In addition, there were at each polling place one Republican and one Democratic watcher and one Republican and one Democratic challenger, who were appointed by the Republican and Democratic ward committees, respectively.

CHARGES OF INTIMIDATION

There is some evidence in the record that party workers wearing badges, at and near the polling places, and in a few instances some of the election officials, solicited voters to vote for the Democratic candidate in violation of the election laws of the State of Missouri. In no precinct, however, were these or any other irregularities testified to by the contestant's witnesses, of such a nature or of such an extent as to warrant the throwing out of the vote of any precinct; and there is no evidence whatever to connect the contestee or his agents with any of such irregularities. For instance, one of the contestant's witnesses, Mrs. Grace Guy, testified that a union labor man urged her to vote for Gov. Cox for President because of his friendship for organized labor, the names of the congressional candidates not even being mentioned.

The only case of actual intimidation seems to have been that of the Rev. Eugene V. Hansmann, who, according to his own testimony, was assaulted and taken to the station house by a police officer in the first precinct of ward 20 without any apparent justification. On cross-examination he testified that he had never preferred charges against the police officer who arrested him.

*Ballots.*—The results of an examination and complete recount conducted by bipartisan election officials upon stipulation of the parties were held binding on contestant.

*Ballots.*—An elections committee refused to partially recount ballots not returned as disputed from the complete recount which had been conducted by election officials pursuant to stipulation of the parties, where the result would not be changed, where fraud was not proven by certain markings, and where contestant was estopped by the stipulation from such challenge

*Fraud* was not proven by contestant's receiving fewer votes than candidates of his party for other offices, where the political situation in the district was found consistent with such disparity.

Report for contestee, who retained his seat.

THE RECOUNT

On January 11, 1921, a stipulation was entered into between the contestant and the contestee and their respective counsel, a copy of which will be found on pages 269 and 270 of the printed record, that "the board of election commissioners should open the ballot boxes used in the eleventh congressional district at the election held on November 2, 1920, and recount the bal-

lots for the office of Representative in the Sixty-seventh Congress for the eleventh congressional district of Missouri." In this stipulation, which was signed by both the contestant and his attorney, it was agreed that in case the validity of any ballot for either the contestant or the contestee was challenged the question should be decided by the board of election commissioners. The recount was commenced on January 12 and completed on January 17, 1921. The actual counting was done by 40 assistants appointed by the board of election commissioners, 20 of them being Democrats and 20 of them being Republicans. After the recount was completed and the board of election commissioners had passed upon all disputed ballots, the final result showed that Harry B. Hawes, Democrat, had received 35,404 votes and Bernard P. Bogy, Republican, had received 33,337 votes, making a plurality for Harry B. Hawes, Democrat, of 2,067, or a net gain for Bernard P. Bogy, the Republican contestant, of 67 votes.

At the hearing before your committee, the contestant claimed that in spite of the fact that the recount was conducted by an equal number of Republican and Democratic counters, and in spite of the fact that both the contestant and the contestee were given the privilege of having a watcher at each table where the ballots were being counted, nevertheless, the recount was not fairly conducted for the reason that in some instances the contestant and his watchers were not given an opportunity to see some of the scratched ballots for the purpose of disputing the same. At a meeting of the board of election commissioners held on January 25, 1921, after the recount had been completed and the ballot boxes sealed up, the attorney for the contestant requested the board for permission to photograph all of the scratched ballots in ward 19, precinct 12; ward 26, precinct 22; ward 26, precinct 17; ward 20, precinct 14; and ward 22, precincts 8 and 9. This request was denied by the board by a vote of three to one, on the ground that the ballots of which photographs were desired, were not returned by the recount clerks as "disputed ballots" and because it was contrary to the stipulation. According to the record, these were the only precincts in which any request was made for the reopening of the ballot boxes.

At the hearing before your committee, the contestant requested your committee to send for these particular ballot boxes and examine all the ballots. Even if all of the scratched ballots should prove to be in the same handwriting and should be counted for the contestant, it would not alter the result. Moreover, the fact that Republican ballots might be found in these boxes in which the contestant's name was crossed out and the name of the contestee written in, even if the handwriting were the same, would not necessarily be evidence of fraud as under the laws of Missouri, the election officers are permitted to mark the ballots for illiterate voters. For these reasons your committee declined to send for the ballot boxes in question and is of the opinion that on the whole the recount was fairly conducted and that the contestant, having agreed to abide by the decision of the board of election commissioners in regard to all disputed ballots, he is precluded from now questioning the result of the official recount.

SUMMARY AND CONCLUSION

In this case the contestant apparently feels that because the Republican candidate for President carried the eleventh congressional district of Missouri by a plurality of 2,403 votes, while at the same time he, the Republican candidate for Congress, was defeated by his Democratic opponent by a plurality of 2,067 votes, the result must have been due to fraudulent practices. As a matter of fact, the eleventh congressional district of the State of Missouri has been a Democratic district for many years and under normal circumstances would naturally elect a Democratic Congressman. The fact that the contestee had long been a resident of the district, while the contestant had only recently moved into the district, would easily account for the fact that the former would run ahead of his ticket, while the latter would run behind. Moreover, it is admitted by the contestant that most of the Republican committeemen and most of the Republican election officials were hostile to his election. Finally, he was not the choice of the Republican voters, another candidate having decisively defeated him at the primary and he having received his nomination from the congressional committee. This opposition on the part of the active Republican workers of the district would easily account for the fact that his name was uniformly scratched in all the precincts of the district on election day.

As has already been stated, the contestant did not even offer to prove most of the allegations contained in his notice of contest and offered no evidence whatever of any fraud or irregularities in most of the 155 precincts of the congressional district. While, as the committee has pointed out, there is some evidence of occasional violations of the election laws of the State of Missouri, there is no evidence whatever to justify the committee in throwing out the vote of any voting precinct. Your committee believes that considering the very great congestion at the polls due to the voting of women for the first time, the election held in the eleventh congressional district in the State of Missouri on November 2, 1920, was, on the whole, quiet and orderly and fairly conducted. Furthermore, in order to discover any possible discrepancies or evidence of fraud, an official recount was held by the bipartisan board of election commissioners of the city of St. Louis, under a stipulation signed by the contestant and his attorney, that all disputed ballots should be decided by the board. Your committee believes that this recount was fairly conducted and that the official result of the recount showing that Harry B. Hawes, the contestee, was elected by a plurality of 2,067 over his Republican opponent, Bernard P. Bogy, the contestant, in the absence of competent evidence to dispute it, is a fair and accurate expression of the wishes of the voters of the eleventh congressional district of Missouri. Your committee, therefore, for the reasons hereinbefore stated, respectfully recommends to the House of Representatives the adoption of the following resolutions:

> *Resolved,* That Bernard P. Bogy was not elected a Representative in this Congress from the eleventh congressional district of the State of Missouri and is not entitled to a seat herein.

> *Resolved,* That Harry B. Hawes was duly elected a Representative in this Congress from the eleventh congressional district of the State of Missouri and is entitled to retain his seat herein.

Reported privileged resolution (H. Res. 205) agreed to by voice vote after brief debate [61 CONG. REC. 6555, 67th Cong. 1st Sess., Oct. 20, 1921; H. Jour. 494].

**§ 3.3 Kennamer v Rainey, 7th Congressional District of Alabama.**

*Evidence* offered by contestant to support allegations of registration frauds and irregularities was insufficient to affect election results.

*Suffrage.*—Women voters were not denied the right to register or vote by a conspiracy of the state legislature.

*Irregularities* by election officials in permitting unregistered persons to vote were held insufficient to affect the election result.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 3 submitted by Mr. Cassius C. Dowell, of Iowa, on Oct. 31, 1921, follows:

Report No. 453

CONTESTED ELECTION CASE, KENNAMER V RAINEY

At the November election held in the seventh congressional district of the State of Alabama on the 2d of November, 1920, according to the official returns, L. B. Rainey, the contestee, who was the Democratic candidate, received 23,709 votes, and Charles B. Kennamer, contestant, who was the Republican candidate, received 22,970 votes. As a result of these returns L. B. Rainey, the contestee, was declared elected by a majority of 739 votes, and a certificate of election was duly issued to him and upon such certificate he was duly seated as a Member of the Sixty-seventh Congress.

On the 11th day of December, 1920, the contestant, Charles B. Kennamer, in accordance with law, served on the contestee a notice of contest setting forth a number of grounds of contest, generally charging, in various forms, fraud and malconduct of various officers, and charging fraud and irregularities in the registration of voters, and charging generally that certain officers, members of committees, and members of State legislature conspired to postpone legislation for the registration of women voters in said district, and further charging that they did deprive certain women from registering and voting in said district, and further charging that L. B. Rainey was not elected to said office, but that contestant was duly elected. . . .

It is charged by contestant that the governor, members of the legislature of the State, and certain other persons conspired to delay legislation authorizing the registration of women voters of the district and delayed the appointment of registrars to register these voters. The proclamation of the ratification of the woman's suffrage amendment was made on August 26, 1920.

The governor issued a call for a special session of the legislature on August 28, 1920, to convene on September 14, 1920. The record shows that the legislature convened on the 14th day of September, 1920, in special session, and the legislation referred to was completed and signed by the governor on October 2, 1921, which was the last day of the extra session. It appears that other legislation was considered and acted upon by the legislature during this time.

Your committee do not find the charge of conspiracy to delay this legislation and to delay the appointment of registrars to be sustained by the evidence.

It is further charged by contestant that a number of Republican women were not registered and were denied the opportunity to register. The testimony of contestant on this point is very indefinite and uncertain and does not sustain the charge of contestant.

It is further charged by contestant that the registration boards were partisan and unfair in their selection of the various places for the registration of voters, and that said boards unlawfully registered Democratic voters and did not give the Republican voters the opportunity to register and refused their registration.

Your committee find from a careful inspection of the evidence that some persons were registered unlawfully, and the evidence shows that a small number not legally entitled to vote voted for the contestee, Mr. Rainey; but the testimony does not show that the number of votes cast of those who were not properly registered and who were not legally entitled to vote materially affected the result of the election.

While there were some other irregularities, and perhaps violations of the law in some instances, the evidence does not disclose that these irregularities or violations affected the result of the election in this district. Neither does the evidence disclose that the persons who failed to vote in said district were deprived of their right to register and vote, nor is it shown by competent evidence that they offered to register or vote.

On the whole case the official returns show that contestee, L. B. Rainey, received a majority of 739 votes, and the evidence submitted in this case does not sustain the charges of the contestant that contestant should be declared elected.

Your committee therefore find that L. B. Rainey received a majority of the votes cast in the seventh congressional district of the State of Alabama on the 2d day of November, 1920, and that he was duly elected.

Your committee therefore, for the reasons herein stated, respectfully recommend to the House of Representatives the adoption of the following resolutions:

> *Resolved,* That Charles B. Kennamer was not elected a Representative in this Congress from the seventh congressional district of the State of Alabama, and is not entitled to a seat herein.
>
> *Resolved,* That L. B. Rainey was duly elected a Representative in this congress from the seventh congressional district of the State of Alabama,and is entitled to retain his seat herein.

Privileged resolution (H. Res. 221) agreed to by voice vote after brief debate [61 CONG. REC. 7214, 67th Cong. 1st Sess., Nov. 2, 1921; H. Jour. 523].

**§ 3.4 Rainey v Shaw, 20th Congressional District of Illinois.**

*Federal Corrupt Practices Act.*—Contestant's allegations of violations during contestee's primary election were insufficient, based on advisory opinion of the Attorney General construing a Supreme Court opinion holding such act invalid with respect to nominations.

*Federal Corrupt Practices Act.*—Provisions requiring timely filing of receipt and expenditure statements by candidates in a general election were construed as directory, and the fact that the Clerk did not receive statements held insufficient grounds for unseating contestee where evidence showed attempted compliance.

*Answer to notice of contest.*—Filing after the required time was found not prejudicial to contestant and therefore not grounds for unseating contestee.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 2 submitted by Mr. Robert Luce, of Massachusetts, on Dec. 6, 1921, follows:

Report No. 498

CONTESTED ELECTION CASE, RAINEY V SHAW

Guy L. Shaw, it is admitted, received a majority of the votes cast at the election November 2, 1920. His seat is contested by Henry T. Rainey by reason of circumstances connected with the corrupt practices act and the statute relating to procedure in election contests. An allegation of improper use of certain funds received by Mr. Shaw was not supported by any evidence whatever, nor was it further pressed upon the committee, by argument or otherwise. There was no charge of illegitimate use of money among the voters of the district, nor of expenditure beyond the limit prescribed by law. In the end the contestant restricted his contentions to matters of failure to comply with statutory requirements.

After notice of contest had been filed, the Supreme Court, in the case of Truman H. Newberry et al. *v.* The United States, gave an opinion, May 2, 1921, bearing upon the corrupt practices act. As to the effect thereof, the Attorney General has advised your committee as follows:

> It is my opinion that the Newberry decision should be construed as invalidating all of the provisions of the act referred to, relating to nominations for the office of Senator or Representative in Congress, whether by primaries, nominating conventions, or by endorsement at general or special elections. I am also of the opinion that as to statements of receipts and disbursements to be filed by candidates for the office of Representative in Congress under

> section 8 of the act, the only provision now in force and effect is the one which requires such statements to be filed in connection with the election of such candidates.

Agreeing with this view, we conclude that such of the allegations of the contestant as concerned the primaries in the district in question fall to the ground, by reason of the unconstitutionality of so much of the act as related to nominations; but that those allegations connected with the election should be considered. These center upon the contention that Mr. Shaw should be held to be disqualified because he failed to file within the time prescribed statements of his receipts and expenses in connection with the election. On this point the testimony of Mr. Shaw is to the effect that he duly mailed such statements. They were not received by the Clerk of the House. Had Mr. Shaw taken advantage of the statute and sent the documents by registered mail, no question would have arisen. However, the law does not make registration a requisite, and, as a matter of fact, many returns forwarded without registration have been unhesitatingly accepted. Apart from the nonarrival of the statements, there was no evidence tending to contradict Mr. Shaw's testimony, but, on the other hand, there was evidence to the effect that at least some of the statements had been duly prepared. With the case so standing, it seemed clear to your committee that in this particular no sufficient reason had been advanced for declaring Mr. Shaw to be disqualified, even if it were to be assumed that the requirements of law in the matter of filing statements are mandatory rather than directory. Therefore that question need not here be once more discussed, though in passing it may not be undesirable to point out that the precedents support in general the view that such requirements are directory and therefore that failure to observe them will not of itself invalidate an election.

The only other contention seriously pressed in behalf of the contestant was that Mr. Shaw had failed to comply with the statutory requirement for the filing of an answer to notice of contest within a stipulated time. Here the evidence showed no willful neglect on the part of Mr. Shaw, nor any injury to Mr. Rainey. Mr. Shaw appears to have erred in his understanding as to what would be a compliance with the law, and did not receive legal advice in the matter until the time for proper reply had passed, but a proper reply was then made, and in ample time to protect all of Mr. Rainey's rights. Under such circumstances, where no harm has resulted to anybody, where no act or failure to act has shown moral obliquity, where no statutory purpose has been thwarted to the public detriment, there is no ground for the contention that a district ought to be deprived of the services of its duly chosen representative, or that the dignity or the honor of the House calls for his exclusion.

Therefore the committee recommends to the House the adoption of the following resolutions:

> *Resolved*, That Henry T. Rainey was not elected a Representative in this Congress from the twentieth congressional district of the State of Illinois and is not entitled to a seat herein.

*Resolved,* That Guy L. Shaw was duly elected a Representative in this Congress from the twentieth congressional district of the State of Illinois and is entitled to retain a seat herein.

Privileged resolutions (H. Res. 248, H. Res. 249) agreed to after debate by voice vote [62 CONG. REC. 431, 432, 67th Cong. 2d Sess., Dec. 15, 1921; H. Jour. 37].

**§ 3.5 Campbell v Doughton, 8th Congressional District of North Carolina.**

*Ballots.*—Absentee votes were not rejected where lack of voter domicile was not proven by contestant.

*Ballots.*—The absentee return was not entirely rejected for failure of election officials to preserve all such ballots, where state law was reasonably interpreted by officials to require preservation only of certain absentee ballots with accompanying certificates, and not others, and fraud was not proven by contestant.

Report of Committee on Elections No. 2 submitted by Mr. Robert Luce, of Massachusetts. on May 27, 1922, follows:

Report No. 882

CONTESTED ELECTION CASE, CAMPBELL V DOUGHTON

Returns from the district in question, with conceded corrections, show a vote of 32,944 for Robert L. Doughton and 31,856 for James I. Campbell, making Doughton's apparent majority 1,088. The seat is contested on various grounds.

ABSENTEE VOTING

The contestant asks that all the absentee votes be thrown out, for the reason that the great bulk of them were fraudulent, and for the further reason that the ballots and certificates were not preserved and returned as required by law, making it impossible for the contestant to pursue his inquiries with thoroughness. The chief fraud alleged was in the matter of residence qualification. In this particular the committee does not think the charges are borne out by the evidence. The difficult problem of domicile, so greatly involving in its determination the question of intent, seems on the whole to have been met by the local officials with as much fairness and wisdom as could have been reasonably expected, and the testimony presents little if any suggestion of conscious misfeasance. In the case of new registrations a registrar is rarely in position to question the applicant's declaration of intent. In the case of voters already on the roll the declaration in the certificate accompanying the ballot of an absentee, that he is "a qualified voter," seems virtually to preclude the officials at the polls from rejecting the ballot on the ground that the absentee has abandoned his residence.

The practical effect is to postpone inquiry until the result of the election is contested. Such inquiry must then be largely confined to persons other

than the absentee voters themselves, as it turned out in the present case. The testimony of such other persons must be largely opinion testimony, which is always of doubtful weight. For this reason it was held in Lowe *v.* Wheeler, Forty-seventh Congress, that the mere statement of a witness that an elector is a nonresident is insufficient; the witness must give facts to justify his opinion. Furthermore, lack of acquaintance on the part of a single witness will not be adequate proof. In Letcher *v.* Moore, Twenty-third Congress, the committee unanimously adopted as a rule of decision "that no name be stricken from the polls as unknown upon the testimony of one witness only that no such person is known in the county." This becomes of all the more importance in the case of absentee voters because they are so often persons who are little at home and who may indeed have passed most of the time away for years. If these things be borne in mind, much of the contestant's testimony aimed at the absentee vote will be found to fall to the ground. The acceptance of ballots from voters whose poll-taxes may not have been paid raised a more debatable issue, which may best be considered later in this report. Apart from the votes disputed by reason of domicile or nonpayment of poll-taxes, we find only about 175 absentee votes specifically questioned by the contestant with any shadow of basis for suspicion, and the rejection of all of these would not by itself change the result of the election.

The contestant, however, avers that in any case the whole absentee vote should be rejected because of the failure to preserve ballots and accompanying certificates, which in his belief the law required. The governing provision is to be found in section 4a of chapter 322 of the Public Laws of 1919, relating to absentee voting:

> In voting by the method prescribed in chapter 23 of the Public Laws of 1917 the voter may, at his election, sign, or cause to be signed, his name upon the margin or back of his ballot or ballots, for the purpose of identification. The ballot or ballots so voted, together with the accompanying certificates, *and also the certificates provided in section two of this act, in case the voter ballots by that form,* shall be returned in a sealed envelope by the registrar and poll holders, with their certificates of the result of the election and kept for six months, or, in case of contest in the courts, until the results are finally determined.

This was in an act ratified March 11. On the previous day had been ratified the work of a commission that had been engaged in revising and consolidating the public and general statutes, and it had been provided that the commissioners should insert the enactments of the current general assembly, with proper technical changes "and make such other corrections which do not change the law as may be deemed expedient."

The Consolidated Statutes were to be in force from and after August 1. When they appeared, they contained this provision (sec. 8101):

> All public and general statutes passed at the present session of the general assembly shall be deemed to repeal any conflicting provisions contained in the Consolidated Statutes.

From all this it is evident that when the commissioners dropped from section 4a of chapter 322 the words italicized in the section as quoted above, they could not change the purport of the original provision; could not legitimate any interpretation of the section other than the natural interpretation of the original phraseology.

This confutes the argument that the word "so" in the phrase, "The ballot or ballots so voted, together with accompanying certificates," refers back to all the absentee ballots and certificates. Otherwise there would be no significance in the word "also" in the phrase omitted by the commissioners. It is clear, then, that the actual law required the keeping of only the ballots signed for the purpose of identification. Such was the interpretation generally given to it by the election officials of both parties.

It was an interpretation buttressed by the fact that the laws of North Carolina make no provision for the preservation of main election ballots in general; and that no apparent gain would result from segregating at any rate such unmarked ballots as were sent in by the absentee.

Some question may be raised as to the ballots cast by election officials in compliance with instructions given in that particular form of certificate specially mentioned in the phrase omitted by the commissioners—the certificate in which the absentee says he casts a straight party ballot as designated. Possibly it was contemplated that if the ballot as actually cast was attached to or kept with the certificate, in case of contest it might later be learned whether the election officials complied with the instructions. However, the testimony contains almost no charges of misfeasance in this matter of compliance with the voter's instructions, and in this particular no injury appears to have resulted to the contestant because this class of ballots was not in general preserved.

It is clear that failure to preserve the certificates by which a straight party ballot was cast was a violation of the actual law, but it is to be remembered that the phraseology of what purported to be the law, as contained in the Consolidated Statutes and in the extract therefrom printed as a pamphlet entitled "Election Law," which undoubtedly the election officials commonly relied upon, might fairly be construed to mean that only the certificates accompanying marked ballots were to be kept. Election officials can not reasonably be expected to unravel the technical difficulties found in such a situation as this. Indeed, as far as they grow out of the changes made by the commissioners who consolidated the statutes, their very existence was left to your committee itself to ascertain and disclose.

Even if errors were committed in this matter by the election officials, it is well established that "in the absence of fraud the voter can not be deprived of his vote by the omission of election officers to perform the duties imposed upon them by law." (Gaylord *v.* Cary, 64th Cong. Also see Moss *v.* Rhea, 57th Cong.; Larrazola *v.* Andrews, 60th Cong.; Barnes *v.* Adams, 41st Cong.)

The testimony in this case when studied in detail suggests no such amount of fraud as would warrant the exclusion of the whole absentee vote. To be sure, viewed as a whole, this vote naturally arouses question by reason of the great preponderance of Democratic ballots, but, of course, this

would not of itself suffice to invalidate the vote. It may have no determining weight if it can be explained by reasonable considerations. These are to be found in the status of the greater part of the absentees and the relative activity of the party managers.

It is to be borne in mind that the absentee-voting article itself says:

> All the provisions of this article, and all the other election laws of this State, shall be liberally construed in favor of the right of the elector to vote.

Here was a mandate to the officials not to quibble nor stand upon technicalities. The voter was to have the benefit of the doubt. When such injunctions are specifically set forth, the clearest proof is necessary in order to sustain an allegation of fraud in the acceptance of ballots. No such proof has been presented by the contestant.

The following minority views were submitted by Mr. John L. Cable, of Ohio:

The conduct of the election in many precincts of the eighth congressional district of North Carolina was so tainted and permeated with fraud, corruption, conspiracy, forgery, disregard of the law by some of the election officials, misconduct and impropriety—all constituting such a grievous assault upon the integrity of the ballot box in such precincts that, in the opinion of the undersigned, these acts remove from the official return the sacred character with which the law should clothe them and place the burden of proof upon the contestee, Doughton, to maintain the legality of the official count. This he has failed to do and is not entitled to hold his seat as a Member of Congress. . . .

The vote in the district upon which the certificate of election was issued to the contestee stood as follows: Doughton, 32,934; Campbell, 31,856; Doughton's alleged majority, 1,078.

But the absentee votes included above are "so tainted with fraud that the truth can not be deductible therefrom." The ratio of the absentee votes of Doughton and Campbell tell their own story, 1,596 to 201, respectively. Without this absentee vote Campbell wins by 317 votes. In Iredell and Rowan Counties Doughton received a total of 1,041 to Campbell's 87, or 12 to 1. The illegal absentee votes can not be separated from the legal, and all absentee ballots should, therefore, be rejected.

In addition contestant is entitled to 254 additional votes and contestee 24 by reason of the Democrats purposely delaying and depriving Republicans from voting in Fur and Big Lick precincts. . . .

ABSENTEE VOTERS

It is apparent from the following list of absentee votes cast and counted in the counties of Rowan, Iredell, Stanly, Ashe, and Caldwell, that fraud must have been perpetrated against contestant Campbell in the preparation and casting of the votes. . . .

Prior to the 1919 amendment to the absentee electoral law there was no provision for the preservation of any of the absent-elector certificates or ballots, but in this same chapter 322 of the 1919 assembly the law was amended by providing that certain certificates and ballots should be "kept for six months" after the election, viz:

> I. Ballots signed by absentee voter for identification purposes.
>
> II. Certificates (Form B) provided by section 2 of the 1919 law calling for a straight party ticket.

The courts have never passed upon the question as to whether or not it is legal to destroy the absentee certificates prior to the six months' period of time. There is no law authorizing the destruction of the general election ballots. No matter how a court should construe this provision, the record clearly shows that the destruction of the certificates was a part of the conspiracy whereby many illegal votes were cast. Prior to the election the Democrats received the application of absent electors for certificates or ballots. No public record was kept of the name and residence of these applicants, and no knowledge was obtained by the Republicans as to who applied to vote under the absent-elector law. The first information the Republicans obtained as to the identity of those who desired to vote by absentee was at 3 o'clock on the day of election when the Democratic registrar produced for the first time the envelopes containing the absent electors' certificate or certificate and ballots, as the case might be, depending upon the method the elector desired to use in voting. The envelopes were opened at 3 o'clock and if Form B was used, ballots representing the desire of the elector were picked up from the table and put in the ballot box, and the Democratic registrar retained the envelope and certificate. If Form A was used, the ballots were taken from the envelope and put in the ballot box. In either case, Republicans had no opportunity of obtaining information whereby the casting of these ballots might be challenged. Directly after the ballots were counted, they, together with the certificates, were destroyed or secreted. The absentee electoral vote was the means of casting 1,596 Democratic votes for Contestee Doughton, while but 201 absentee votes were cast for Contestant Campbell. The record shows that absentee ballots were cast on behalf of Contestee Doughton in part as follows: In the name of the dead; the insane; without the knowledge or consent of those who did not vote; a second absentee ballot without knowledge or consent of those who had already voted; for and by many nonresidents of the State; for and by many who had not paid their poll tax, as required by law; on forged certificates.

By destroying or secreting the absentee certificates and marked ballots it was impossible for contestant Campbell to obtain or to trace and discover the identity and eligibility of the absentee voter in every case; that is, from the certificate itself. Contestant, however, by means of witnesses, introduced evidence showing that votes were cast as above outlined.

To be a qualified elector in North Carolina section 5937 in part provides:

> The residence of a married man shall be where his family resides, and that of a single man where he sleeps.

Notwithstanding this provision of the law, evidence was introduced by contestant showing that many absentee ballots were cast in the name of actual nonresidents of the voting precincts and even the State; such absentees were living in Ohio, Illinois, Kentucky, Georgia, California, and many other States of the Union, sometimes for 10 or 12 years.

A vote was cast for a man confined in the State institution for the insane at Morgantown, on the western branch of the Southern Railroad, whereas the envelope containing the certificate was mailed at Winston-Salem, many miles from the hospital and not on the same railroad that ran through Morgantown, in which it was located.

Because the identity of the absentees was concealed by reason of the destruction of the certificates after the election and because of the operation of the law before election it was impossible for contestant to trace all absentee votes and show their illegality.

*Fraud.*—Conspiracy to defraud was not proven by contestant where election official's inefficiency prevented timely opening of some polls and the casting of some ballots.

*Unethical campaign practices* against a candidate on contestant's ticket that were not attributable to contestee were held not prejudicial against contestant.

*Registration.*—Registration of voters by election officials, allegedly on a partisan basis, at places other than those designated for registration (as permitted by state law) were held not prejudicial against contestant.

*Registration.*—Denial of access to registration books to contestant's party workers was found insignificant.

The majority report continued:

CONSPIRACY

In two precincts of Stanly County (Big Lick and Fur) the conduct of the polling was not inconsistent with the possibility of conspiracy. Insufficient accommodation was provided for the voters; apparently the crowd was not handled with ordinary skill; there were instances of delay that might well have aroused suspicion. On the other hand although the total vote polled was much less than in sundry other precincts, and it was charged that 264 voters were unable to vote before the polls closed at sunset, yet in one case 750 and in the other 695 ballots were cast, more than 1 a minute, leaving no ground to infer conspiracy simply from the total of the figures. The weight of the evidence showed no discrimination, except in favor of the women and most of the elderly men, who regardless of party were given precedence. Although as these precincts were strongly Republican, the loss fell chiefly on the Republican ticket, yet Democrats suffered as well as Republicans, and it is hard to believe that men would deliberately plan to deprive their own partisans of exercising the right of suffrage in the hope that a larger number of their opponents would be shut out. Direct evidence of

conspiracy was wholly lacking, and the circumstances could be explained as due to the inefficiency of election officials.

INTIMIDATION

By reason of the circulation and exhibition of a picture with implications most unfair to the Republican candidate for President, and a libellous publication purporting to be a genealogical tree, each meant to arouse prejudice by raising the negro question in a peculiarly obnoxious way, it was averred that numerous voters who otherwise would have voted the Republican ticket, either voted the ticket of the other party or stayed away from the polls. To this it was rejoined that if any such effect was produced, it was much more than offset by the indignation aroused in Republicans and the consequent stimulus to harder work. Of course, neither thing is capable of much verification and anyhow there was not even a charge that Mr. Doughton knew of the matter or had in it any share whatever. Language strong enough for the censure of such methods of campaigning is hard to find, but it would be unwise to say that because of a vicious attack, wholly indefensible, aimed at a candidate for one of the various offices to be filled at an election, candidates for other offices should be imperiled.

REGISTRATION

In North Carolina the law requires the attendance of registrars at the place of registration on the four Saturdays preceding an election, and permits the registrars at any other time to register elsewhere. The contestant averred unfairness by registrars when away from the registration places, in that they would then devote their energies mainly to registering voters of their own faith, to the neglect of voters of opposite faith. If there was violation of law in this particular, it was to be found only in disregard of that part of the oath taken by the registrar which imposed on him the duty of acting "impartially." Undoubtedly a registrar would have been delinquent if he had refused to register any qualified voter presenting himself at the registration place on the appointed days, for registration was then obligatory. To register elsewhere and at other times was wholly permissive. Where it is altogether within the discretion and pleasure of an official whether an act shall be performed at all, and its performance is accompanied by no denial of rights, can the act be impeached on the score of partiality? No voter in North Carolina has either an inherent or a statutory right to be registered away from the registration place. If there was neglect to give any voter an opportunity that in fact was within the discretion of the official concerned, it can not be treated as partiality from the legal point of view.

Complaint was made that in various instances friends of the contestant were impeded in getting access to registration books in time to make proper inquiry as to ground for preferring challenges on challenge day or at the polls. However, even putting the worst face on the episodes cited, the offenders, if they were such, generally kept within the letter of the law, and the exceptions were neither considerable nor important enough to be given much weight in the balancing of considerations.

In his minority views Mr. Cable contended:

DELAY DEPRIVING REPUBLICANS FROM VOTING

In Stanly County, Fur and Big Lick precincts are heavy Republican. The Democrats so conducted the election in these two precincts that many Republicans were deprived of casting their vote for contestant. In Fur precinct the polls were opened so that voting began about 8 o'clock, when the law requires the opening of the polls at sun-up—a delay of at least an hour and a half. . . .

In both of these precincts Democrats were given preference in being permitted to vote, so that when the polls were closed those without and not being permitted to vote numbered 254 Republicans and 24 Democrats, or a ratio of 10 to 1, while the record shows that the vote cast in these precincts ran 3 Republicans to 1 Democrat.

The vote in these precincts does not compare in number to the vote in some of the heavy Democratic precincts. It ran as high as 1,600. The record is filled with many other cases of illegality and fraud, but it is not necessary to go into them in this report. Not only the rights of contestee and contestant are at issue here, but the rights of the people of the district and of the State, and of the people of the United States are involved. The undersigned respectfully contends that it is impossible to separate the legal from the illegal absentee ballots, and therefore all absentee ballots must be thrown out and deducted so that the final vote in this case should be as follows:

| | Campbell | Doughton |
|---|---|---|
| Cast in person | 31,655 | 31,338 |
| Unlawfully deprived of voting | 254 | 24 |
| Total | 31,909 | 31,362 |
| Campbell's lawful majority | 547 | ..... |

I therefore recommend to the House that "James I. Campbell was elected as Representative from the eighth congressional district of North Carolina, and is entitled to a seat herein; and that Robert L. Doughton is not duly elected as Representative in this Congress from the eighth congressional district of North Carolina, and is not entitled to retain his seat herein."

*Suffrage.*—Widespread failure to observe state constitutional requirements for payment of poll tax and for a literacy test, tacitly approved by the parties and election officials, absent fraud and not affecting the election result, was censured by an elections committee but held not to be sufficient grounds for voiding the election.

Majority report for contestee, who retained his seat as the House took no disposition.

Minority report for contestant.

The majority report concluded:

POLL TAXES

The constitution of the State required, with certain exceptions, the prepayment of poll taxes as a qualification for voting. The requirement was in general disfavor, and indeed at this very election was taken out of the constitution. Nevertheless, it was at the time a living thing and should have functioned, universally and impartially. It did not so function. In one county, by definite agreement between the organizations of both parties, the law was not enforced at all. Throughout the district it was not enforced against men in the military service, justification being supposedly found in an opinion of the attorney general of the State which held that such men might be exempted. In many other instances enforcement or refusal to enforce was more or less arbitrary and accidental, seeming to depend on the whim of the officials or the sentiment of the locality. Of course this opened wide the door for abuse, and abuse walked in. Each side contends that many votes improperly cast accrued therefrom to the benefit of the other. To determine the facts and strike a completely accurate balance would be impossible without prolonged and exhaustive individual inquiry on the spot, and even then the lack of certain records would so embarrass investigation as to cloud its results. For example, in Iredell County, where it was agreed that the poll-tax requirement should not be enforced, the sheriff did not certify the list of those who had paid, as required by law. This might entail individual inquiry as to the legality of every vote east in the county. Furthermore, that would be of no avail unless the voters were compelled to disclose the character of their votes, which raises the mooted question of violation of the secrecy of the ballot. Indeed, the situation is so confused that the contestant asks us to throw out the whole vote of the county. Such drastic treatment does not seem to us called for by the circumstances. The contestant saw fit not to rely solely upon his request, but proceeded with examination of many Iredell County witnesses in this particular, and we deem it sufficient to content ourselves with their testimony and that of witnesses for the contestee in the same field. The same course has been pursued in respect of the contentions about votes said to be invalid because of nonpayment of poll taxes in the other counties and of absentee votes as well as of those personally cast.

LITERACY QUALIFICATIONS

The constitution of the State requires, with exceptions not now of material consequence, that every person presenting himself for registration shall be able to read and write. As in the case of the poll-tax provision, this requirement was extensively ignored. In certain parts of the district the people seem to have been unanimous in the opinion that their judgment in this particular was above the constitution. Each side contends that as a consequence the other gained many votes with which it ought not to have been credited. Here, too, an attempt to determine the facts with complete accuracy would require lengthy and laborious inquiry on the spot, with little promise of satisfactory conclusion, and we have thought it sufficient to rely on the testimony.

These kindred contentions, relating to constitutional requirements in the matter of poll-tax and literacy qualifications, furnish the main question of principle involved in this case. It will be seen to differ from the usual contest in that the important complaint is not of restraint of suffrage, nor its improper extension on a large scale without the knowledge or consent of a candidate or his adherents, but of such an extension made with common knowledge and general consent. Strictly speaking, there is no difference in effect between the suppression of votes and their nullification by offsetting votes illegally cast. The question here is whether the approval, avowed or tacit, by the candidates and their adherents, prior to the conclusion of the election, alters the situation.

Precedents to help us are rare. We have found but two cases throwing any light on the question. In Taliaferro *v.* Hungerford, Thirteenth Congress, with regard to certain irregularities in the conduct of polling, declared by the sitting Member to be matters of general practice and sanctioned by long usage, the committee pronounced:

> We feel no hesitation in saying that custom ought not to justify a departure from the letter and spirit of positive law.

Therefore the committee recommended that the election be set aside. The House refused to take this advice and recommitted the matter, whereupon the committee again reported that the election should be set aside because it had been conducted in an irregular manner. This time the House squarely took issue with the committee and voted that the sitting Member should keep his seat.

In a case from the same State in the following Congress, Porterfield *v.* McCoy, the sitting Member advanced an agreement between himself and the petitioner under which a certain class of votes should be received at the polls, another should be rejected, and persons having a right to vote in one county but happening to be at an election in another county of the same district might vote in such other county. The committee was of the opinion that the agreement of the parties could neither diminish nor enlarge the elective franchise as secured to the freeholders of the district. This view, however, did not cost the sitting Member his seat, for, after throwing out the votes that on various grounds were held to be illegal, he was found still to have a majority.

These cases do not cover the whole matter here in issue. The first indicates merely that the House was averse to annulling an election where custom had sanctioned irregularities that in fact related to form rather than substance. The second did not go beyond agreement between candidates and at most was obiter. So we are still confronted by the question:

When an electorate deliberately and with common consent disregards the provisions of a State constitution to an extent clouding the result, has there been a valid election?

It is a question of much perplexity. On the one hand there is grave danger in encouraging the belief that a constituency may violate constitutional injunctions with impunity. On the other hand there is grave doubt whether Congress may properly mete out punishment when there is no clear and

convincing proof that the will of the constitutional majority has been thwarted. Balancing these considerations, your committee has concluded, though not without misgivings, that when acts alleged to have violated the provisions of a State constitution do not appear to have changed the result, either by themselves or in combination with statutory misdemeanor, the House is not justified in declaring a seat vacant.

This neither excuses nor palliates the conduct in question. We have no hesitation in declaring that it was reprehensible. Respect for law and observance of constitutions are essential to the safety of our common rights. If either basic or secondary law ceases to represent the will of the majority, it should be annulled or changed, but while it stands, it should be enforced. We are not called upon to consider what may be the duty of the State itself in the way of prevention or penalty. Our position simply is that failure to enforce the provisions of a State constitution, a failure generally approved or acquiesced in by candidates and electors, without conscious defiance of authority, and without heinous circumstances, resulting from no wish or intent to work injustice, and not proved to have altered the result, will not in and of itself suffice to vitiate an election to the House of Representatives.

Confining ourselves, then, to inquiry as to individual votes as far as illuminated by the testimony, and taking that testimony at its face value, with due allowance for contradiction, we have sought to strike a balance between the contentions of the opposing parties. By reason of the great intricacy of the record, which is confused by duplications and a large variety of uncertainties, mathematical accuracy in this balance is impossible, but we have been able to satisfy ourselves that even with liberal allowance of the contestant's claims, the majority of the contestee would not be overcome.

Therefore the committee recommends to the House the adoption of the following resolutions:

> *Resolved,* That James I. Campbell was not elected a Representative from the eighth congressional district of the State of North Carolina and is not entitled to a seat herein.
>
> *Resolved,* That Robert L. Doughton was duly elected a Representative in this Congress from the eighth congressional district of the State of North Carolina and is entitled to retain a seat herein.

Reported privileged resolution (H. Res. 355) was considered under extended debate, contestant participating in debate, but without final House disposition [62 CONG. REC. 7808, 67th Cong. 2d Sess., May 27, 1922; H. Jour. 389].

**§ 3.6 Paul v Harrison, 7th Congressional District of Virginia.**

*Registration.*—State constitutional requirement that voters file unassisted, handwritten applications was held mandatory, voiding ballots cast by voters not filing or assisted in filing registration applications.

*Registration*.—Ballots cast by voters filing defective unassisted written applications were held merely voidable and were counted where supplemented by oral examination under oath by a registrar as permitted by the state constitution.

Report of Committee on Elections No. 1 submitted by Mr. Frederick W. Dallinger, of Massachusetts, on June 14, 1922, follows:

Report No. 1101

CONTESTED ELECTION CASE, PAUL V HARRISON

STATEMENT OF THE CASE

At the election held in the seventh congressional district in the State of Virginia on November 2, 1920, according to the official returns, Thomas W. Harrison, the contestee, who was the Democratic candidate, received 13,221 votes and John Paul, the contestant, who was the Republican candidate, received 12,773 votes. As a result of these returns Thomas W. Harrison, the contestee, was declared elected by a majority of 448 votes over his Republican opponent, John Paul, and a certificate of election was duly issued to him by the secretary of state of Virginia.

On December 18, 1920, the contestant, in accordance with law, served on the contestee a notice of contest in which were set forth numerous grounds of contest which may be summarized under three main heads:

1. That a large number of persons voted at this election who were not lawfully registered, and therefore under the constitution of Virginia were not qualified to vote, and that if the votes of these persons were eliminated the contestant would be elected.

2. That a number of persons voted at this election without paying their poll tax, as required by the constitution and laws of Virginia, and that if the votes of these persons were eliminated, together with the other facts in the case, the contestant would be elected.

3. That the conduct of the election in certain precincts of the district was marked by such reckless disregard of the provisions of the constitution and laws of Virginia that the returns from those precincts do not represent the expression of the will of the people; that there was no valid election in those precincts, and therefore the returns from them should be thrown out, in which case the contestant would be elected.

To this notice of contest the contestee on January 14, 1921, served on the contestant an answer denying all the allegations contained in the contestant's notice, charging numerous cases of illegal registration, and making sundry allegations of irregularities in certain voting precincts of the district.

WORK OF THE COMMITTEE

The testimony in the case having been printed and printed briefs having been duly filed by both parties, hearings were given to the parties by the committee on Tuesday, February 7, and Wednesday, February 8, 1922, at which oral arguments were presented by the contestant and his counsel,

Henry W. Anderson, Esq., and by the contestee and his counsel, William M. Fletcher, Esq. Since the close of the hearing the committee has examined the long and voluminous record and given the case most careful and painstaking consideration.

ILLEGAL REGISTRATION

Under section 18 of the constitution of the State of Virginia no one is allowed to vote who has not been registered, and the requirements for registration for all persons registered since January 1, 1904, as provided in section 20 of said constitution, are very drastic. These requirements on the voter are as follows:

> 1. That he has personally paid to the proper officer all State poll taxes assessed or assessable against him, under this or the former constitution, for the three years next preceding that in which he offers to register; or, if he came of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid $1.50, in satisfaction of the first year's poll tax assessable against him.
>
> 2. That, unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for the two years next preceding, and whether he has previously voted; and if so, the State, county, and precinct in which he voted last.
>
> 3. That he answer on oath any and all questions affecting his qualifications as an elector submitted to him by the officers of registration, which questions and his answers thereto shall be reduced to writing, certified by the said officers, and preserved as a part of their records.

In the voluminous record in this case there is evidence of hundreds and even thousands of cases of persons who were registered although no applications at all had been filed with the registrar. There are also numerous instances in the record where assistance was given to applicants for registration, either by the registrar himself or by some third person. In addition to this the contestee introduced in evidence a large number of cases of persons who were placed on the registration list whose applications were not in strict conformity with the requirements of the constitution.

Both the contestee and his counsel contended that these provisions of the constitution were merely directory and not mandatory, and that the votes of persons not registered in conformity with the constitution could not be questioned at the election, the only remedy being to have the names of persons thus illegally registered stricken from the voting list previous to the election, as provided in the constitution. On the other hand the contestant and his counsel contended that these provisions of the constitution being mandatory on the legislature of the State are also mandatory on the reg-

istration and election officials; and that where no application is filed the registrar acquires no jurisdiction and the vote of any person placed on the registration list in the absence of such application is void ab initio. . . .

In regard to the facts relative to the registration at this election of persons who had filed no applications there is no room for difference of opinion, as the contestant proved his case by calling as witnesses the registrars in the various precincts who under the system in vogue in Virginia were all members of the party to which the contestee belonged, and they testified that they registered the voters whose names were inquired of without requiring any written applications as required by the constitution. In a large number of the precincts registrars testified that they had never received any written applications during their entire terms of office. The committee finds that there were almost 1,900 cases of such illegal registration of persons whose names were set out in the contestant's notice and in the contestee's answer. In addition there were almost 3,200 additional cases of void registrations not set out in the notice and answer but shown by the evidence, making a total of over 5,000 cases of persons who voted at the last congressional election in this district whose registration and therefore whose votes were invalid. In its consideration of the evidence the committee has in the first instance confined itself to the names set forth in the notice and answer on the theory that where the parties in their pleadings set up particular names they should be strictly held to the names set forth in the pleadings.

The contestant further contended that the votes of persons who were assisted in making their applications, either by the registrar or by other parties, are equally void ab initio and should not be counted. In view of the fact that the constitution provides that the voter must make application "without aid, suggestion, or memorandum, in the presence of the registration officer," the committee is of the opinion that this contention is sound, as the written applications in such cases would not be the applications of the voters themselves.

While the contestee vigorously contended throughout the taking of the testimony and at the hearings before the committee that all the votes of persons registered contrary to the provisions of the constitution should be counted on the ground that the registration could not be attacked collaterally, he also contended that if the committee should decide against him, all applications which did not strictly contain all the information set forth in the constitution should be treated in the same manner, and he had placed in the record a large number of alleged defective applications.

The committee has examined with care the applications in the cases of all persons whose names were set forth in the contestee's answer and finds that a very large number of the applications contain all the information required by the second clause of section 20 of the constitution. In the case of a considerable percentage of the applications which are technically defective the voters, mostly women, voting for the first time under the nineteenth amendment to the Federal Constitution, have simply neglected to state that they had never before voted, a fact of which any court might well take judicial notice. The contestant contends that it would be absurd to place such defective applications in the same category as cases where no applications were

filed or where assistance was given, and cites the analogy of the validity of a judgment, even though the notice, in a court of record, is grossly defective in form, once the court has acted on it and when judgment is given. He also calls attention to the fact that, although a notice in a suit is defective, amendments are invariably allowed by the courts whenever the interests of justice demand.

The committee is of the opinion that this analogy is sound. As Judge McLemore well says in the Suffolk Local Option Election case (17 Va. Law Reg. 358) before referred to—"the registrar has no jurisdiction in the premises until there has been an application as specifically provided by the constitution." The fact that the third paragraph of section 20 of the Virginia constitution provides for an examination under oath of the applicant by the registrar as to his qualifications, implies that the written application might not contain all of the required information; otherwise the registrar would not need to ask the applicant any questions but could from the application itself, after having sworn the applicant, make the proper entries on the registration book. If, however, the written application is imperfect then the registrar can put the name of the applicant on the registration book after asking him questions as to his qualifications.

In other words, while the registrar has no authority under the constitution to ask any questions or to do anything else until a written application has been made to him by a person in his own handwriting, without aid, suggestion, or memorandum, when such application has been made, however defective it may be, then the registrar has jurisdiction to act, and he can ask the applicant any questions about his qualifications to vote, the registrar in such cases being required to reduce such questions and answers to writing and to preserve them. Consequently the committee is of the opinion that defective applications when once received by a registrar, under the Virginia law are not void but merely voidable, and the vote of a person registered on such an application supplemented by the examination under oath by the registrar should not be thrown out in an election contest.

While this is the opinion of the committee, nevertheless, in arriving at its final result the committee has considered not only the defective applications in the cases of the names set forth in the contestees answer, but also all the defective applications offered in evidence by the contestee accompanied by proof that the parties actually voted at the congressional election even where the names were not set forth in the answer.

The following minority views were submitted by Mr. C. B. Hudspeth, of Texas, and Mr. Alfred L. Bulwinkle, of North Carolina:

If the same standards are applied to many precincts carried by the contestant as have been applied to the precincts carried by the contestee and rejected by the committee and this method of treating illegal votes is adopted, the contestee would be elected by a majority in excess of that shown by the returns. In the absence of any data or statistics we are unable to determine how the committee arrive at the figures in which in any one of seven alternatives they find that the contestant received a majority. We have care-

fully considered the results of the election and have come to the following conclusion:

First. The majority at each precinct by its ruling disfranchises a very large per cent of the voters about whose registration and their right to assistance no question can be raised. They were registered prior to 1904 and were entitled to vote with or without assistance.

Second. Hundreds of others, who registered properly according to the views of the majority and cast their ballot without assistance are disfranchised on the vaguest testimony of assistance of some vague kind to some unidentified voters, or because some did not make a proper application. In many of the precincts the challenged vote proved to have voted, is very small compared to the unchallenged vote. . . .

Fourth. Contrary to the Virginia constitution and contrary to the decision of Judge McLemore, emphasized by his letter, the majority holds, that a mere written application, though in no wise complying with the requirements of Virginia law is sufficient, and without a written application is void.

*Suffrage.*—Ballots cast by voters not paying the poll tax required by the state constitution were rejected.

*State election law* requiring bipartisan judges, prohibiting assistance to voters at registration and polling places, and requiring proper custody and secrecy of ballots was held mandatory.

*Returns* were totally rejected in precincts where election official's fraud or irregularities violated mandatory state election laws; and, in other precincts, where rejected either on the basis of the number of voided ballots actually proven to have been cast for each candidate, or by proportional deduction method where it could not be determined for which candidate illegal ballots had been cast.

Majority report for contestant, who was seated.

Minority report for contestee, who was unseated.

The majority report concludes:

POLL TAXES

Both parties in the present case agree that the votes of persons who have failed to pay their poll taxes, as required by the constitution, should not be counted in determining the result of the election. While a great deal of space in the printed record and in the briefs is taken up with this question of poll taxes owing to the fact that both the contestant and the contestee in their pleadings, charged that a large number of persons were illegally permitted to vote who had not paid their poll taxes, the committee finds that the charges were sustained in only about a hundred cases. Where the evidence shows for whom the person voted deduction has been made from the vote of that particular candidate, and where there is no evidence how the party voted a deduction has been made pro rata from the total vote of both candidates in the particular precinct. . . .

Under this grossly unfair system the legislature elects the judges of the circuit court, all of whom are members of the dominant party, even in those circuits where a majority of the voters belong to the minority party. The decisions of these circuit judges in all election cases are final, there being no appeal to the appellate court, as in other States. These judges appoint, in each county and city, electoral boards of three members each, with no provision for minority representation, and these boards are almost invariably composed entirely of partisans of the dominant party. The electoral boards in turn choose the registrars, who are always members of the party in power, and also the judges and clerks of election. In the case of the latter the only provision for minority representation is the loosely drawn requirement that in the appointment of the judges of election representation "as far as possible" shall be given to each of the two major political parties, but in all cases the selection of the so-called minority member is exclusively in the hands of the electoral board, which, as mentioned above, is always in the control of the majority party.

At the congressional election held in the seventh congressional district in 1920 the election machinery was absolutely in the control of the political party to which the contestee belongs. The judges who appointed the electoral boards were all Democrats and all the electoral boards, except in the counties of Rockingham and Page, were made up exclusively of members of the same party.

In addition to the utter disregard of the mandatory provisions of the State constitution respecting registration and the failure to conform to the requirement in respect to the appointment of Republican judges of election, there were also in a large number of precincts violations of the constitutional and statutory provisions concerning the secrecy of the ballot, the keeping of the ballot box in view, the counting and disposition of the ballots, and especially the provision prohibiting the election officials from giving assistance to voters unless registered previous to 1904 or unless physically disabled. . . .

SUMMARY AND CONCLUSION

After a careful and exhaustive consideration of all the evidence the committee finds that in the precincts of Howardsville, Wingfields, North Garden, Owensville, Lindsey, Covesville, Carters Bridge, Court House, Monticello, Batesville, Keswick, Stony Point, Porters, Hillsboro, Free Union, Ivy, and Scottsville in Albemarle County; in the fourth ward of the city of Charlottesville; in the precincts of Mount Airy, Russells, and White Post, in Clarke County; in the precincts of Dry Run, Old Forge, Brucetown, Newtown, or Stephens City, Greenwood, Gore, Neffstown, Middletown, Kernstown, Armel, Gainsboro, and Canterburg in Frederick County; in both wards of the city of Winchester; in the precincts of Mount Olive and Fishers Hill in Shenandoah County; and in the precinct of Mount Crawford in Rockingham County; there was such an utter, complete and reckless disregard of the mandatory provisions of the fundamental law of the State of Virginia involving the essentials of a valid election, that it can be fairly said that there was no legal election in those precincts. Consequently, in accordance with the universally accepted principles of the law governing contested elections and

in conformity with a long line of congressional precedents, from the Missouri case of Easton *v.* Scott in the Fourteenth Congress (Powell's Digest, p. 68) down to and including the cases of Wickersham *v.* Sulzer in the Sixty-fifth Congress, of Tague *v.* Fitzgerald in the Sixty-sixth Congress, and of Farr *v.* McLane decided by this committee in the same Congress, the committee is of the opinion that the entire returns of these precincts should be rejected.

Rejecting the returns from the above precincts, and, in accordance with congressional precedent, deducting from the total returned votes of the contestant and contestee in the remaining precincts of the district the votes of all persons whose votes were void because of nonpayment of poll taxes or on account of illegal registration where it was definitely proved for whom they voted, and in all other cases deducting such void votes pro rata, the result of the congressional election held in the seventh district of the State of Virginia on November 2, 1920, would be as follows: John Paul, Republican, received 10,001 votes; Thomas W. Harrison, Democrat, received 8,445 votes; and the contestant is elected by a majority of 1,556 votes. If in addition there are deducted in like manner the votes of all persons named in the contestee's answer whose written applications were proved to be defective in form (although the committee is of the opinion, as already stated, that such votes are not void), the result of the election is found to be as follows: John Paul, Republican, received 9,637 votes; Thomas W. Harrison, Democrat, received 8,431 votes; and the contestant is elected by a majority of 1,206 votes.

Moreover, if in addition there are deducted pro rata the votes of all persons who were registered by Democratic registrars in Republican precincts, whose written applications were not in strict conformity with the Virginia constitution, and which were offered in evidence by the contestee but not set forth in his answer, in spite of the fact that the committee has limited the contestant in the matter of illegal votes to names set forth in his notice of contest, the result of the election would be as follows: John Paul, Republican, received 9,036 votes; Thomas W. Harrison, Democrat, received 8,084 votes; and the contestant is elected by a majority of 952 votes. Again, if the contestee is given credit for all defective applications claimed by him, regardless of whether they are in fact defective and regardless also of any proof that the persons in question actually voted, the result would be as follows: John Paul, Republican, received 8,680 votes; Thomas W. Harrison, Democrat, received 8,068 votes; and the contestant would still be elected by a majority of 612 votes.

Furthermore, if the returns from none of the precincts are rejected, although many of them clearly ought to be for the reasons hereinbefore stated, and the votes that are illegal and void on account of no written applications being filed by the voter "without aid, suggestion, or memorandum," and on account of the nonpayment of the poll tax, as required by the constitution of the State of Virginia, are deducted from the returns in the manner hereinbefore described, under the construction of the law as found by the committee that the votes of persons registered on written applications without assistance, if received by the registrar, are not void but merely voidable, the result of the election would be as follows: John Paul, Republican, received 11,607 votes; Thomas W. Harrison, Democrat, received 10,265 votes; and the

contestant is elected by a majority of 1,342 votes. If in addition there are deducted from the returns the votes of persons whose names were set out in the contestee's answer whose written applications were defective in form, although, as above stated, the committee does not consider that such votes are void, the result would be as follows: John Paul, Republican, received 11,158 votes; Thomas W. Harrison, Democrat, received 10,911 votes; and the contestant is elected by a majority of 247 votes. Finally, if neither party is confined to the names set out in the pleadings, although the committee is of the opinion that in all fairness they should be, and the votes of all persons who voted and whose registration was illegal because of the failure to file written applications without assistance, or whose applications although accepted by the registrar were actually defective in form, are deducted from the returns in the manner hereinbefore described, the result would be as follows: John Paul, Republican, received 9,312 votes; Thomas W. Harrison, Democrat, received 9,074 votes; and the contestant is still elected by a majority of 238 votes.

Your committee therefore respectfully recommends to the House of Representatives the adoption of the following resolutions (H. Res. 469):

> *Resolved,* That Thomas W. Harrison was not elected a Member of the House of Representatives from the seventh congressional district of the State of Virginia in this Congress and is not entitled to retain a seat herein.
>
> *Resolved,* That John Paul was duly elected a Member of the House of Representatives from the seventh congressional district of the State of Virginia in this Congress and is entitled to a seat herein.

Mr. Hudspeth and Mr. Bulwinkle concluded in their minority views:

In our opinion in order to warrant the rejection of the returns at any precinct it was incumbent upon the contestant to show facts which warranted the disenfranchisement of every voter at such precinct, or at least to make an effort to do so. In most of the precincts which were rejected only a relatively small portion of those registered were shown not to have complied with the constitutional requirements, and many of the voters necessarily need not have complied with such requirements. At such precincts many of the voters were entitled to assistance because they had registered prior to 1904, and the evidence as to assistance was so vague and indefinite in respect to the character of the assistance and who and how many were assisted that in our judgment it constitutes no ground for the rejection of the poll. Certainly voters entitled to assistance should not be disenfranchised and not allowed to participate in the election in question because some assistance might have been given to those not entitled to assistance, and such voters entitled to assistance should not suffer on account of the delinquency of any of the election officers and other voters. It is incumbent upon the contestee to use every effort to show the number of those illegally assisted and who they were and also establish the number of persons as to whom

no complaint as to registration or assistance could be made and thus afford a basis for some correct conclusion to be made by the committee. At not a single precinct in the district did the contestant make any effort to do this. Not a single person was called to show that he was assisted. On the contrary, the contestant in introducing evidence as to assistance merely asked whether the judges would assist the voter and sometimes asked whether they would do so, without regard to whether they were on the permanent or the new roll. No attempt was made in most instances to establish the character of the assistance or whether it consisted in merely giving information as to how to mark the ballot or in the actual marking of the ballot itself. . . .

It was incumbent upon the contestant to establish these facts. Did space permit, other instances might be cited of a similar nature in respect to assistance. From an examination of the facts and a consideration of the law we are of the opinion that the returns from the precincts rejected by the committee should not have been rejected and that the proper course to have been pursued would have been to apportion the illegal votes proved to have been cast. . . .

Third. The majority ruled, that the parties were confined to the names set up in the notice and answer and denied the right to prove that any one voted for contestant by circumstances. The result was reached, that the very persons set up in the answer as having voted for contestant and proved by strong uncontradicted evidence to have so voted under the proportionate rule were counted as having voted for contestee. . . .

Fifth. Hundreds of names not in his notice were introduced in evidence by contestant in his own time, and hundreds of others in contestee's time and at his expense. Furthermore contestee introduced evidence not to prove illegal votes for he has always claimed the votes were legal, but to prove that contestant was not prejudiced by the construction of the law adopted by the election officials in which contestant for years has acquiesced.

Sixth. The majority does not enter into specifications and it is impossible to understand their figures, but they show very little consideration given to the record, when they say there were only a few Republican precincts at which persons were registered without written application. Counting Ottobine, in Rockingham County, where there was no sort of individual action on the part of the registrant and where the registrations are admitted to be void, there are 49 precincts in the evidence at which parties were allowed to register without a written application. Four of these were about a tie, but 23 of them, Republican precincts. If the proof of contestee is admitted as to how the voter cast his ballot, 666 would be deducted from contestant's vote, and 505 from contestee, and the contestee would be elected by 609 majority instead of 448. If, however, the loss at each precinct is apportioned, then 505 would be deducted from contestee and 407 from contestant and contestee would still be elected by 350 majority.

If the defective registrations are not counted, then under the apportionment plan contestee would be elected by 932 majority and by proof of how the voter voted, by 1,382 majority.

At this election, owing to the admission of the women to suffrage, the registration was very heavy. It is estimated that about 8,000 women registered and as the Republicans were far more active and enthusiastic than the disunited and dispirited Democrats, nearly 2 to 1 of these women were Republicans. It is only natural, therefore, if there were any flaws in the registration, the Republicans would be the greater sufferers.

Seventh. The majority in one of its summations, undertakes to give a result based on a count of all illegal ballots and reaches this conclusion, to wit: John Paul received 9,312 votes and Thomas W. Harrison 9,074. Again the majority fails to furnish any basis for its figures, and it is impossible for the same to be correct. According to this estimate the total vote was 18,386, and the total, according to the certified returns, is 25,994. The majority has deducted, therefore, 7,608 as illegal votes. A careful tabulation by precincts shows that the total number of votes about which, in the evidence, there is the slightest suggestion of illegality is only 5,834, and this is much in excess of the true illegal vote. So that 1,764 votes are deducted more than in the evidence are suggested as illegal.

In the precincts of ward 1, ward 2, ward 3, Charlottesville; Lindsey, Keswick, Stony Point, Crozet, Amisville, Woodville, Edinburg, Mount Jackson, McGaheysville, Keezleton, and West Harrisonburg registrants were permitted to have the benefit of the statute.

In the precincts of Howardsville, White Hall, Hillsboro, Free Union, North Garden, Owensville, Batesville, Carters Bridge, Russells (Clarke County), Shenandoah, Pine Hill, Quicksburg, Hudson Cross Roads, Strasburg, Printz Mills, Columbia Furnace, Shirley, Leaksville, Luray, Elkton, Singers Glen, Swift Run, Melrose, and Porters there was evidence of assistance of an indefinite or more or less indiscriminate character, but who were assisted and in what the assistance consisted is vague and indefinite. Of these precincts 10 are Democratic, 13 Republican. It has not seemed fair to undersigned to disfranchise those properly registered by proving somebody received some sort of assistance to which by possibility he might not have been entitled, but if any uniform or fair rule is applied it will add to contestee's majority.

The undersigned therefore recommend that the House adopt the following resolutions:

> *Resolved,* That John Paul was not elected a Member of the House of Representatives from the seventh congressional district of the State of Virginia in this Congress and is not entitled to a seat herein.
>
> *Resolved,* That Thomas W. Harrison was duly elected a Member of the House of Representatives from the seventh congressional district of the State of Virginia in this Congress and is entitled to retain a seat herein.

C. B. HUDSPETH.
A. L. BULWINKLE.

The reported privileged resolution (H. Res. 469) recommended in the majority report was permitted consideration (when the Speaker

overruled a point of order that the committee report had not been printed when first submitted), was debated, and was divided for the vote (the first part being agreed to 203 yeas to 100 nays with 2 "present"; the second part being agreed to 201 yeas to 99 nays with 2 "present") [64 CONG. REC. 531, 67th Cong. 4th Sess., Dec. 15, 1922; H. Jour. 59–61].

**§ 3.7 Gartenstein v Sabath, 5th Congressional District of Illinois.**

*Evidence* not taken by contestant within the legal time was held inadmissible where an extension of time for good cause was not sought, and as stipulations of the parties for extensions are not binding on the House.

Report of Committee on Elections No. 3 submitted by Mr. Cassius C. Dowell, of Iowa, on Dec. 20, 1922, follows:

Report No. 1308

CONTESTED ELECTION CASE, GARTENSTEIN V SABATH

At the general election held in the fifth congressional district of the State of Illinois on November 2, 1920, Jacob Gartenstein, the contestant herein, was the Republican candidate and Adolph J. Sabath was the Democratic candidate for Representative in the Congress of the United States. William Newman was the Socialist candidate and received a number of votes. Adolph J. Sabath at said election was declared elected, and a certificate was issued to him accordingly.

On the 21st day of December, 1920, Jacob Gartenstein served notice of contest upon Adolph J. Sabath, setting forth certain grounds of contest and charging fraud, irregularities, errors, and mistakes in the returns from certain precincts at said election, and charging that while the official returns showed Adolph J. Sabath to be elected by a plurality of 298 votes, a true and correct tabulation of the votes cast at the election in said fifth congressional district would show that the contestant, Jacob Gartenstein, was elected by a plurality of more than 1,500 votes.

On January 15, 1921, Adolph J. Sabath, the contestee, served his answer upon contestant, denying the allegations in the contestant's notice and petition, and denying that there was any miscounting or mistabulating in the counting of votes in said precincts. . . .

It will be noted that contestant began taking testimony 25 days after the time for his taking testimony had expired under the statute, and closed his taking of testimony under the various stipulations 80 days after his 40 days for taking testimony under the statute had expired. . . .

The section of the statute providing for the taking of testimony in a contested-election case is in the following language:

> Sec. 107. In all contested-election cases the time allowed for taking testimony shall be 90 days, and the testimony shall be taken in the following order: The contestant shall take testimony

> during the first 40 days, the returned Member during the second 40 days, and the contestant may take testimony in rebuttal only during the remaining 10 days of said period. This shall be construed as requiring all testimony in cases of contested elections to be taken within 90 days from the date on which the answer of the returned Member is served upon the contestant.

While this statute has been held to be directory, and is not binding upon the House, yet under ordinary circumstances the contestant has been required to commence and complete his evidence within the 40 days allowed by statute, and if further time is required it must be granted by the House, and may be granted only after showing a good and sufficient reason therefor. . . .

In the case under consideration the contestant not only does not show diligence but the record clearly shows without reason or excuse by numerous stipulations undertook to set aside the operation of the statute and practically took no testimony in the 40 days allowed him by statute. Had the contestant come before the House asking for an extension of time to take testimony after the expiration of the 40 days there can be no question this would not have been granted to him, for the record discloses that he had no good reason to ask for extension of time for taking testimony. However, at each date to which extension had been made he stipulated with the contestee for further continuances and extensions, and without asking leave of the House, undertook to set aside the statute limiting time for taking the evidence.

. . . In the case under consideration there was no question of the limitation by the statute, and the record clearly shows that the parties were attempting to set aside the operation of the statute by agreements between themselves. If this action is to be approved by the House, contested-election cases in the future may, by stipulation between the parties, be presented to the House at any time the parties may see fit, and the statute may thus be nullified.

Your committee finds in this case that contestant was not diligent in prosecuting his case, and did not present his proofs within the time prescribed by statute.

*Returns* are prima facie evidence of the correctness of an election, and may be rejected only by a complete recount of ballots properly preserved as best evidence.

*Ballots.*—Testimony of witnesses making a tally at a partial recount, conducted by an official appointed to receive testimony, was held inadmissible where all ballots cast were not offered as evidence by contestant at such recount.

*Ballots.*—An elections committee refused to order a complete recount where ballots and ballot boxes were not proven by contestant to have been properly preserved.

Report for contestee, who retained his seat.

INTEGRITY OF THE BALLOTS

Notwithstanding the findings of the committee relative to the time for taking testimony, your committee has in this case examined the record and the evidence relative to other questions raised in the contest. . . .

Before a recount of the ballots may be had in an election contest proof of inviolability of the ballot boxes and their contents is necessary.

We will here submit a small part of the record and evidence relative to the preservation and care of the ballots in this case: . . .

The above record is set out to show the general condition of the ballots and ballot boxes as they were presented to the commissioner taking testimony.

The proofs in this case show that the judges of election, after counting and canvassing the ballots, placed them in boxes and delivered them to the election commissioners' office. The delivery of these ballots began at 8 or 9 o'clock on the evening of the election and continued until the afternoon of the following day. The evidence discloses that the ballot boxes in some instances were not of sufficient size to hold all the ballots cast in the precinct, and when this happened the ballots were folded and tied with a rope and the bundle was delivered with the ballot box to the commissioners' office. The evidence shows these ballots remained in the office of the election commissioners for some time and that a number of employees were designated to handle the ballots and store them in the vault on the floor above. A number of these were temporary employees.

It is well settled that before resort can be had to the ballots as means of proof, absolute proof must be made that the ballots offered are the identical ballots cast at the election; that they had been safely kept as required by law; that they are in the same condition they were when cast; that they had not been tampered with, and that no opportunity had been had to tamper with them. The burden of making this preliminary proof rests upon the party who seeks to use the ballots as evidence. (English *v.* Hilborn, 53d Cong., Rowell, p. 486.)

In order to command confidence in a recount "it is necessary for the contestant first to establish the identity of the ballot boxes, and, secondly, show that these boxes had been so kept as to rebut any presumption that they had been tampered with." (Butler *v.* Layman, 37th Cong.) . . .

The returns of election officers are prima facie correct, and a recount showing a different result can not be regarded unless it affirmatively appears that the ballots recounted are the same as those originally counted and in the same condition.

The record in this case not only does not show that the ballots were folded, wired, and sealed when presented to the commissioner taking testimony, as required by law, but the proofs affirmatively show that in a number of the precincts the ballot boxes were not tied and sealed as required by the Illinois statute. In some instances at least the evidence clearly shows that the ballot boxes were not at all sealed when taken from the vault, but were tied and bundled together in such manner that the boxes could be opened and closed without disturbing the appearance of the ballot boxes.

With the ballots and ballot boxes in this condition, and with the evidence of Mr. Curran that people were in and out of the vault where these ballots were kept, it seems to your committee that the proofs of the integrity of the ballots have not been established. Therefore your committee holds that proofs of the proper and legal preservation of the ballots have not been established in this case.

THE BEST EVIDENCE MUST BE OFFERED

Contestant, in order to establish his claim of error and miscount, called certain witnesses who were clerks in the election commssioner's office. These witnesses were called upon by contestant to go through the ballots in a number of the precincts in the fifth congressional district and announce to another witness, who kept tally of the votes announced for Member of Congress in the precinct, which witness afterwards read the results of the tally to the commissioner taking depositions. In this manner the contestant went through a number of the precincts in said fifth congressional district. By the count in this manner the vote of the contestant increased in the various precincts over that of contestee until by this count contestant had increased his vote in the precincts thus counted to overcome the plurality designated by the contestee in the official count. Something like half of the precincts, by this method, were recounted.

The ballots in these various precincts were before the commissioner, but contestant did not have them identified, nor were they offered in evidence. But, over the objection of contestee, the witnesses were directed to count the ballots in the above manner and report the result of the count to the commissioner taking testimony.

The election board, under the law, is presumed to have made correct returns in this election. . . .

Your committee is of the opinion that the primary evidence of the votes cast for the candidates for Representative in the Congress of the United States in this district was the poll books and ballots themselves, and that the official count by the election officers should not be set aside by the testimony of a witness who merely looked at the ballots and testified to the results.

Upon a proper showing and upon the production of the ballots properly protected and preserved, contestant was entitled to a recount of these ballots. But this proof should be established by the best evidence, and the ballots being present should have been offered in evidence as the best evidence in the case. The House will not set aside the official count except upon positive proof that the official count was incorrect.

A RECOUNT SHOULD INCLUDE ALL THE BALLOTS

In this case the witness who went through the ballots examined only those in perhaps half of the voting precincts in the district. It has been held that a recount, if had, should include the ballots in all of the precincts in the district.

If it is reasonable to suppose that there was error in counting ballots in certain precincts, it would be equally reasonable to assume that there were errors in counting in the remaining precincts. If any recount is ordered it should be of all of the ballots cast in the district. (Galvin *v.* O'Connell, 61st Cong., Supplement Election Cases, p. 39.) We quote from the opinion on page 40:

> The contestant asked that about 1,500 ballots cast in said election precincts be ordered recounted by the committee and the House, and the contestee insists that in case this is ordered the order include the whole number of 25,000 ballots cast. On this the committee rules as follows: "It is the opinion of the committee that if on the evidence submitted it would be reasonable to suppose that there was error in judgment in the counting of the ballots cast in the wards and precincts mentioned by the contestant, it would be equally reasonable to assume that there were errors in judgment in the counting of the ballots in the remaining wards and precincts, and that if any, all of the ballots cast at said election, aggregating 35,669, should be ordered for recount by the committee and the House."

Where some of the ballots had not been preserved, the committee denied recounting the balance of the ballots. (Murphy *v.* Haugen, 53d Cong., p. 58, Supplement; Canton *v.* Siegel, 64th Cong., p. 92, Supplement; Brown *v.* Hicks, 64th Cong., p. 93, Supplement.)

The committee can only report cases on the evidence furnished by the parties. We can neither make the evidence nor improve the quality nor supply the deficiency of that furnished. (See Goode *v.* Epps, 53d Cong., Rowell, p. 469.) In this case contestee had a majority of 868 on the returns and received the certificate. We quote from the opinion in this case the following:

> Most of the returns appear to have been thrown out because the ballots or poll books were not properly sealed, or the returns were irregular, ambiguous, or not delivered by the proper official. The committee went over the evidence in detail and complained that contestant had not in most instances produced the best evidence available.

In the case under consideration the ballots were the best evidence of the votes cast for each candidate for Member of Congress. The ballots are not in evidence and are not therefore before the committee. No attempt was made by contestant to offer these ballots to be canvassed by the committee, but contestant seeks in this case to overthrow the official canvass of the votes by the legally constituted election boards by calling a witness to go through the ballots and report the tally to the commissioner selected by contestant to take testimony.

Where a witness testified that he compared the poll lists, entry lists, or lists of persons struck from the registry list of a county, and presented a list of names which he said were found on the poll list but not on either of the other lists, the committee held that "these statements made by the witness

are inadmissible. The papers themselves are the best and only evidence of what they contain if they are admissible for any purpose. The committee must make the comparison and can not take the statements of the witness as to the result of his comparison." (Finley *v.* Bisbee, 45th Cong., Rowell, p. 326.)

Where votes were proved to have been illegal but the evidence that they were cast for contestee was the testimony of persons who had compared the numbered ballots with the poll list, the ballots themselves not being produced in evidence, the evidence was considered insufficient to justify the deduction of the votes from the vote of the contestee. (See Gooding *v.* Wilson, 42d Cong., Rowell, p. 276.)

The recount in this case should have included all of the ballots in all of the precincts in the fifth congressional district. The ballots not having been offered in evidence by contestant, your committee thinks the evidence in this case is not sufficient to set aside the official returns. For the reasons set forth in this report your committee recommends the adoption of the following resolutions:

> *Resolved,* That Jacob Gartenstein was not elected a Representative in the Sixty-seventh Congress from the fifth congressional district of Illinois, and is not entitled to a seat therein.
>
> *Resolved,* That Adolph J. Sabath was duly elected a Representative in the Sixty-seventh Congress from the fifth congressional district of Illinois, and is entitled to retain his seat therein.

Reported privileged resolution (H. Res. 574) agreed to by voice vote without debate [64 CONG. REC. 5469, 67th Cong. 4th Sess., Mar. 3, 1923; H. Jour. 346].

**§ 3.8 Parillo v Kunz, 8th Congressional District of Illinois.**

*Evidence* not taken by contestant within the legal time was held inadmissible where delay was not excusable (although the parties had stipulated to extensions), rendering contestant without standing to institute the contest.

*Evidence.*—Assuming admissibility of evidence, contestant failed to sustain his allegations where fraudulent marking of ballots was not proven and where the partial recount of disputed ballots by an official appointed to take testimony was not sufficient to change the election result.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 1 submitted by Mr. Frederick W. Dallinger, of Massachusetts, on Jan. 15, 1923, follows:

Report No. 1415

## CONTESTED ELECTION CASE, PARILLO V KUNZ

### STATEMENT OF THE CASE

At the election held in the eighth congressional district of the State of Illinois on November 2, 1920, according to the official returns Stanley H. Kunz, the contestee, who was the Democratic candidate, received 15,432 votes; Dan Parillo, the contestant, who was the Republican candidate, received 14,627 votes; and Harry C. Stockbridge, who was the Socialist candidate, received 1,334 votes. As a result of these returns Stanley H. Kunz, the contestee, was declared elected by a plurality of 805 votes over his Republican opponent, Dan Parillo, and a certificate of election was duly issued to him by the secretary of state of Illinois.

On December 21, 1920, the contestant, in accordance with law, served on the contestee a notice of contest in which it was alleged that errors and mistakes had been committed in the count of the ballots in certain precincts of the sixteenth, seventeenth, and nineteenth wards of the city of Chicago, comprising 44 of the 107 precincts constituting the eighth congressional district. The contestant claimed that a recount of the votes cast in the above precincts would disclose that the contestant was duly and legally elected.

On January 12, 1921, the contestee served on the contestant an answer denying all the allegations contained in the contestant's notice and alleging that a recount of certain other precincts therein mentioned would show a gain in the contestee's plurality.

### WORK OF THE COMMITTEE

The testimony in the case was duly printed and the contestant filed an abstract of record as required by the rules of the committee and also a printed brief and argument. The contestee filed no brief. Although the committee gave the contestant and his counsel an opportunity to appear before the committee and argue his case, he declined to do so, stating that he desired the case to be decided upon the printed record and brief.

### FINDINGS OF FACT

Most of the facts in this case are not in dispute. The contestee's answer was served on the contestant January 12, 1921. The act of Congress approved March 2, 1875 (U.S. Stat. L., vol. 18, ch. 119, p. 338), provides that all testimony in contested-election cases shall be taken within 90 days from the date on which the answer of the returned Member is served upon the contestant and that the contestant shall take his testimony during the first 40 days thereof. In this case, therefore, the law required that the taking of all testimony should be completed on April 12, 1921. As a matter of fact, however, no testimony was taken by either party within the 90 days required by law. On February 8, 1921, a stipulation was entered into by the parties that the taking of evidence on the part of the contestant should be commenced on February 28, 1921. On February 28, 1921, it was again stipu-

lated by the parties that the time for taking evidence for the contestant might be continued until April 18, 1921, and on that date the taking of evidence was commenced before Guy C. Crapple, a notary public, in the office of the board of election commissioners in Chicago. By agreement of counsel the wards and precincts in dispute were then taken up in numerical order and the ballots recounted. On October 10, 1921, over seven months after the law required the contestant's testimony to be concluded and almost six months after the law required that the taking of all testimony should cease, the contestant closed his case, and on December 5, 1921, it was agreed that the taking of evidence by both parties should close, this latter date being almost eight months after the time fixed by Congress had expired.

The recount showed that Stanley H. Kunz had received 14,733 votes and Dan Parillo 14,487 votes—a plurality of 246 votes for Stanley H. Kunz, the contestee. At the conclusion of the taking of all the evidence, counsel for the contestant moved to strike out of the recount the entire vote of 19 precincts in the sixteenth ward and of 7 precincts in the seventeenth ward on the strength of the testimony of Howard A. Rounds, a handwriting expert, who testified that, in his opinion, some of the pencil crosses on certain of the ballots in these precincts were made by persons other than the voter himself. Your committee does not consider that the evidence sustains the contention of the contestant and finds that there is no reason why the returns from the precincts in question should be rejected.

CONCLUSIONS OF LAW

Section 107 of the Revised Statutes of the United States as amended by the act of March 2, 1875, explicitly provides that all testimony in contested-election cases shall be taken within 90 days from the date on which the answer of the contestee is served upon the contestant. It has been the invariable practice of the House of Representatives to require the taking of the testimony within the time required by law, except where the time has been extended for good and sufficient reasons. In the Missouri case of Reynolds *v.* Butler (Moore's Digest, p. 28) in the Fifty-eighth Congress the unanimous report of the Committee on Elections No. 2, after reciting facts showing a lack of diligence on the part of the contestant and stating that he had not commenced taking evidence within 40 days from the time of serving notice on the contestee, thus states the law:

> It is quite true that the statute providing and limiting the time for the taking of testimony is not binding upon this House, which under the Constitution is the only and absolute judge of the qualifications and elections of its Members. But, as has frequently been held, it furnishes a wise and wholesome rule of action, and ought not to be departed from except for sufficient cause shown or where the interests of justice clearly require. It would seem that contestant might have commenced and concluded his testimony in this case within 40 days; certainly he might have commenced. No reason whatever appears upon the record why he could not or did not; but upon the argument before your com-

> mittee it was stated that counsel for the present contestant were also counsel for Wagoner in his contest, and that some or all of them were engaged upon that case most of the time. There must, however, have been other counsel in St. Louis quite capable of taking such testimony as was taken in this case.

In the Arkansas case of Bradley *v.* Slemons in the Forty-sixth Congress (Rowell's Digest, p. 339) although the contestee offered no objection, the Committee on Elections excluded all evidence not taken within the time prescribed by the statute.

In the present case the contestant not only does not show due diligence but the record clearly shows that without any reason or excuse whatever he undertook by a series of stipulations to set aside and ignore the clear and explicit provision of the statute. No testimony whatever was taken by the contestant until April 18, 1921, six months after the entire 90 days allowed by the act of Congress for the taking of all the testimony in the case had expired. In this case there is no excuse whatever for the contestant not commencing to take his testimony within 40 days from the service of the contestee's answer as required by law. If he had started to take his testimony immediately after serving his answer, and for good and sufficient reasons had been unable to complete his testimony before the expiration of the 40 days allowed him by law, and had then asked the House of Representatives for an extension of time he undoubtedly would have received an extension. In this case, however, as a matter of fact the record discloses that he had no reason whatever for asking any extension of time and that all of his testimony might have been taken within the 40 days and that all the testimony on both sides of the case might have been taken within the 90 days required by law. Your committee, therefore, finds that in this case the contestant deliberately ignored the plain mandate of the law without any reason or excuse, that he has offered no evidence which can legally be considered by your committee, and that he has no standing as a contestant before the House of Representatives.

SUMMARY AND CONCLUSION

Your committee, therefore, finds that the contestant, not having complied with the provisions of the law, governing contested-election cases, has no case which can be legally considered by your committee or by the House of Representatives. Moreover, even if he had fully complied with the law, your committee finds that as a matter of fact he has failed to prove the allegations contained in his notice of contest; that there is no evidence warranting the rejection of any of the precincts of the district; and that the recount of votes, which he alleged would show that he had been elected, according to his own figures, still shows that the contestee was actually elected by a plurality of 246 votes.

For the above reasons your committee recommends the adoption of the following resolutions:

*Resolved,* That Dan Parillo was not elected a Member of the House of Representatives in the Sixty-seventh Congress from the eighth congressional district of the State of Illinois, and is not entitled to a seat herein.

*Resolved,* That Stanley H. Kunz was duly elected a Member of the House of Representatives in the Sixty-seventh Congress from the eighth congressional district of the State of Illinois, and is entitled to retain his seat herein.

Reported privileged resolution (H. Res. 575) was agreed to by voice vote without debate [64 CONG. REC. 5472, 67th Cong. 4th Sess., Mar. 3, 1923; H. Jour. 346].

**§ 3.9 Golombiewski v Rainey, 4th Congressional District of Illinois.**

*Pleadings.*—Failure of contestant to comply with an elections committee rule requiring filing of an abstract citing portions of evidence being relied upon, and contestant's refusal to respond to offers for committee hearings, were considered grounds for dismissal of the contest.

*Returns* were not rejected where contestant offered insufficient stipulated evidence of fraudulent marking of ballots.

Committee on elections report, incorporating by reference findings of other elections committees in contests considered concurrently, was for contestee, who retained his seat.

Report of Committee on Elections No. 2 submitted by Mr. Robert Luce, of Massachusetts, on Feb. 1, 1923, follows:

Report No. 1500

CONTESTED ELECTION CASE, GOLOMBIEWSKI V RAINEY

The Committee on Elections No. 2, to which was referred the contested election case of John Golombiewski *v.* John W. Rainey, from the fourth congressional district of the State of Illinois, reports as follows:

The result of the election in this district, November 2, 1920, was officially announced to be:

| | |
|---|---|
| John W. Rainey | 23,230 |
| John Golombiewski | 21,546 |
| Charles Beranek | 2,753 |

Golombiewski took steps to contest the election and to that end secured a recount in 90 out of 159 precincts of the district. By the recount Rainey lost 1,008 votes, and Golombiewski gained 321, leaving Rainey with a plurality of 676, irrespective of 179 ballots laid aside as challenged.

Thereupon Golombiewski, through counsel, submitted to the House printed brief and argument, the record of testimony, and an abstract thereof; and Rainey, through counsel, submitted brief and argument. The contestant rest-

ed his case upon the allegation that the fraudulent marking of ballots after they had been cast in 16 specified precincts indicated a degree of corruption warranting the exclusion of all the ballots cast in those precincts. His abstract of testimony failed to comply with the rules adopted by the committees on elections in that it did not by definite citation aid the committee in learning just what testimony was relied upon, unless we are to suppose that a tabulation of figures accepted by both parties could be in and of itself sufficient to prove fraud and mistakes by showing that 179 ballots were challenged. By this tabulation it appears that the challenged ballots were confined to 16 precincts. In each of 12 of these less than 10 ballots were challenged, and in the other 4 the percentage of challenged ballots was not large enough in and of itself to indicate that degree of gross corruption which has hitherto been held by the House to be necessary for the total exclusion of a poll.

This is one of three cases from the city of Chicago which were referred respectively to your three committees on elections. The issues involved and the circumstances are much the same in all three cases. The report of the Committee on Elections No. 3 in the case of Gartenstein *v.* Sabath, submitted December 20 last, and the report of the Committee on Elections No. 1 in the case of Parillo *v.* Kunz, submitted January 15 last, contain discussion of the effect of violating statutory requirements, of incomplete recounts, and of the evidence that should be offered under conditions such as here prevailed, together with analysis of testimony and citation of precedents, all of which apply as well to the present case, and to rehearse them here would be needless repetition. It should, however, be added that in this case counsel for the contestant has failed to proceed beyond the filing of the required documents, repeated inquiries from your committee as to whether he desired a hearing having been wholly ignored.

In view of all the circumstances your committee recommends to the House the adoption of the following resolution:

> *Resolved,* That John Golombiewski was not elected a Representative from the fourth congressional district of the State of Illinois and is not entitled to a seat herein.
>
> *Resolved,* That John W. Rainey was duly elected a Representative from the fourth congressional district of the State of Illinois and is entitled to retain a seat herein.

Reported privileged resolution (H. Res. 576) was agreed to without debate by voice vote [64 CONG. REC. 5473, 67th Cong. 4th Sess., Mar. 3, 1923; H. Jour. 346].

## § 4. Sixty-eighth Congress, 1923–25

### § 4.1 Eligibility of Edward E. Miller, 22d Congressional District of Illinois.

*Federal Corrupt Practices Act.*—A privileged resolution, creating a select committee to investigate the question of the right of a Member

to his seat based on alleged violation of the limitations on expenditures by candidates, was referred to an elections committee, reported adversely and laid on the table by the House.

Report for seated Member, who retained his seat.

Report of Committee on Elections No. 3 submitted by Mr. Richard N. Elliott, of Indiana, on Jan. 18, 1924, follows:

Report No. 56

ADVERSE REPORT

[To accompany H. Res. 2]

The Committee on Elections No. 3, having had under consideration the following resolution—

[House Resolution No. 2, Sixty-eighth Congress, first session]

Whereas it is charged that Edward E. Miller, a Representative elect from the State of Illinois, is probably ineligible to a seat in the House of Representatives;

Whereas such charge is made through a Member of the House and on his responsibility as a Member;

Whereas it is charged that said Miller has grossly misused two trust funds committed to his charge by the State of Illinois while he was treasurer of the State of Illinois in promoting his candidacy for election to the Sixty-eighth Congress; and

Whereas it is charged that said fund so used also greatly exceeds the amount he is permitted by law to expend for said purpose;

1. *Resolved*, That the question of the right of said Miller to a seat as a Representative of the State of Illinois in the Sixty-eighth Congress in the House be referred to a committee of seven Members of the House, to be appointed by the Speaker, and said committee shall have the power to send for persons and papers and examine witnesses on oath as to the subject matter of the resolution.

submits the following report:

That a thorough hearing and investigation was made by the committee, and after hearing the evidence presented it finds that no good reason has been shown to it which would justify the passage of the resolution and the appointment of a special committee of seven Members of the House of Representatives to investigate the charges contained in said resolution.

And it unanimously recommends to the House of Representatives that said House Resolution No. 2 be laid on the table.

Privileged resolution (H. Res. 2) reported adversely and laid on table without debate pursuant to clause 2, Rule XIII [65 CONG. REC. 1154, 68th Cong. 1st Sess., Jan. 18, 1924; H. Jour. 178].

**§ 4.2 Chandler v Bloom, 19th Congressional District of New York.**

*Ballots* disputed at a complete recount conducted by the parties were examined and recounted by an elections committee upon adoption by the House of a resolution reported from that committee authorizing subpena of ballots and election officials.

*Ballots* were rejected where cast by voters not registered in new precincts as required by state law, but ballots cast by voters not signing poll books were not examined as a proportional rejection would not affect the election result.

On Jan. 30, 1924, Mr. Richard N. Elliott, of Indiana, from the Committee on Elections No. 3 reported (H. Rept. No. 131) and called up as privileged the following resolution (H. Res. 166):

*Resolved,* That John H. Voorhis, Charles Heydt, James Kane, and Jacob Livingston, constituting the board of elections of the city of New York, State of New York, their deputies or representatives, be, and they are hereby, ordered to be and appear by one of the members, the deputy, or representative, before Elections Committee No. 3 of the House of Representatives forthwith, then and there to testify before said committee or a subcommittee thereof in the contested-election case of Walter M. Chandler, contestant, *v.* Sol Bloom, contestee, now pending before said committee for investigation and report; and that said board of elections bring with them all of the disputed ballots, marked as exhibits, cast in every election district at the special congressional election held in the nineteenth congressional district of the State of New York on January 30, 1923. That said ballots be brought in the same envelopes or wrappings in which the same now are; that said ballots be examined and counted by and under the authority of said Committee on Elections in said case; and to that end that proper subpoena be issued to the Sergeant at Arms of this House commanding him to summon said board of elections, a member thereof, or its deputy, or representative, to appear with such ballots as a witness in said ease; and that the expenses of said witness or witnesses and all other expenses under this resolution shall be paid out of the contingent fund of the House; and that said committee be, and hereby is, empowered to send for all other persons and papers as it may find necessary for the proper determination of said controversy; and also be, and it is, empowered to select a subcommittee to take the evidence and count said ballots or votes and report same to Committee on Elections No. 3, under such regulations as shall be prescribed for that purpose; and that the aforesaid expenses be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by said Elections Committee No. 3.

House Resolution 166 was agreed to by voice vote without debate [H. Jour. 211, 68th Cong. 1st Sess., Jan. 30, 1924].

Report of Committee on Elections No. 3 submitted by Mr. Guinn Williams, of Texas, on Feb. 23, 1924, follows:

Report No. 224

CONTESTED ELECTION CASE, CHANDLER V BLOOM

STATEMENT OF THE CASE

At the special election held in the nineteenth congressional district of the State of New York on January 30, 1923, according to the official returns, Sol Bloom, the contestee, who was the Democratic candidate, received 17,909 votes and Walter M. Chandler, the contestant, who was the Republican candidate, received 17,718 votes. As a result of these returns Sol Bloom, the contestee, was declared elected by a plurality of 191 votes over his Republican opponent, Walter M. Chandler, and a certificate of election was duly issued to him by the secretary of state of New York. . . .

RECOUNT OF DISPUTED AND PROTESTED BALLOTS

The contestant and contestee had conducted an official recount of the ballots cast in said election in which it was determined that the contestee had received 17,802 apparently good ballots and the contestant had received 17,676 apparently good ballots, leaving an apparent majority for Bloom of 126. Several of the ballots not counted in the official recount were claimed to be good, and the committee under direction of the House of Representatives had all of the disputed and void ballots cast in said election brought before it and canvassed and found that 83 of said rejected ballots were good and 55 of them should have been counted for the contestee and that 28 of them should have been counted for the contestant, which would give the contestee 17,857 and the contestant 17,704, leaving the contestee a majority of 153.

ILLEGAL VOTING BY PERSONS NOT PROPERLY REGISTERED

Under section 150 of the election laws of New York no one is allowed to vote who is not a citizen and who has not been registered under the registration law of said State, and if he removes from the election district in which he is registered to another election district before the day of election, at which he offers to vote, he loses his right to vote, unless he appears before the board of elections of New York City, if he is a voter in New York City, and applies for a transfer or special registration to permit him to vote. Fifteen voters who voted at the special election had removed from the district in which they were registered and in which they had voted at the preceding general election of November, 1922. These voters, the record shows, had not secured a transfer or special registration from the board of elections of New York that would permit them to vote legally at the special election January 30, 1923.

There is evidence in the record to the effect that at least 11 of these voters voted for contestee, that 3 of them voted for contestant, and that 1 of them stated in a sworn affidavit that he voted for contestee, and in his deposition which was taken in this case he testified that he voted for contestant.

ALLEGED ILLEGAL VOTES BECAUSE VOTERS FAILED TO SIGN THEIR NAMES IN OFFICIAL REGISTRY OF VOTERS, TWENTY-EIGHTH ELECTION DISTRICT OF THE ELEVENTH ASSEMBLY DISTRICT, WHICH REGISTRY WAS USED AT THE SPECIAL ELECTION FOR ENTERING SIGNATURES OF THOSE WHO VOTED

Under the New York election law, 1922, sections 202 and 207, each voter is required to place his signature in the signature column of the official registry of voters before he shall be allowed to vote. It is alleged that James Bennett, who voted ballot No. 1; Frank W. Scott, who voted ballot No. 2; Israel Rivkin, who voted ballot No. 3; William Murphy, who voted ballot No. 4; Henry Seeman, who voted ballot No. 5; Patrick McMahon, who voted ballot No. 6; each failed to sign his name in said register and that by reason thereof their votes were illegal. The contestant maintains that their votes should be rejected. There is no evidence in the record, however, to show how any of these persons voted. It is contended by the contestant that inasmuch as five of these voters were enrolled as Democrats, that in the absence of evidence to the contrary, party affiliation of an illegal voter may be considered in determining from whom such votes should be deducted or for whom they should be counted. . . .

SUMMARY AND CONCLUSION

The committee therefore finds that of the 15 illegal votes cast by the voters who had lost their right to vote by moving to another precinct, 11 of them were cast for Bloom and should be deducted from his total vote, and that 3 were cast for Chandler and should be deducted from his total vote. The committee is unable to determine from the evidence for whom the other vote was cast and finds that it should be deducted pro rata from the votes of the contestant and contestee.

That of the 6 votes cast by the voters who failed to sign their names in the official registry in the twenty-ninth election district of the eleventh assembly district, the evidence does not disclose for whom they were voted, and if they were rejected it would have no bearing upon this case on account of the fact that they should in that event be subtracted pro rata from the votes of the contestant and contestee; for this reason the committee does not feel that it is necessary to decide the question of the legality of said votes.

*Returns* were not rejected by the House in precincts where election officials, though not properly qualified or unsworn, acted under color of authority.

*Returns* were not rejected by the House where contestant did not sustain allegations of fraud or intimidation in the casting, counting, or custody of ballots.

The House overruled the majority report of an elections committee which had summarily rejected entire precinct returns for violations of mandatory state election laws and for fraud by election officials alleged by contestant.

Majority report for contestant, who was not seated.

Minority views for contestee, who retained his seat.

TWENTY-THIRD ELECTION DISTRICT OF THE ELEVENTH ASSEMBLY DISTRICT

The contestant contends that the poll of the twenty-third election district of the eleventh assembly district should be rejected for the following reasons:

(*a*) The board of inspectors of said election district was illegally constituted and organized, and was, therefore, without authority to act.

(*b*) In this election district 53 ballots were stolen from the pile of unused or unvoted ballots, and a large majority of them were undoubtedly voted for the contestee, Sol Bloom, by what is called shifting or substitution of ballots.

(*c*) In this election district the record discloses that illegal voting by repeaters and other illegal voters took place on a large scale.

(*d*) Electioneering within the polling place and within the prohibited limit of 100 feet by means of banners and pictures of Bloom, the contestee, and by personal solicitation of his workers, including the Democratic election inspectors themselves, was carried on in this election district, in violation of the election laws of New York.

(*e*) Unsworn persons, other than election officers, were permitted to handle the official ballots both during the day and at the count and canvass of the ballots at night, in violation of the election laws of New York.

(*f*) There was intimidation of Republican workers, who were compelled to leave the election district when most needed in the afternoon of election day by organized bands of ruffians, evidently friends of the contestee herein, who threatened the said Republican workers with fractured skulls and with death if they failed to leave the district at once.

(*g*) Drunkenness and boisterous conduct characterized the actions of the Democratic chairman of the board of inspectors, David Elbern, and the Democratic captain, George Rosenberg, to such an extent that the freedom of the election in that district was destroyed, that intimidation resulted, that scandal disgraced the entire proceedings, and that the election results and returns were rendered unreliable thereby.

(*h*) The method of counting the votes and the preparation of the tally sheets after the close of the polls in this election district were in flagrant violation of the election laws of New York providing for a true count and an accurate return of votes cast.

(*i*) The election returns from this particular election district, as filed with the board of elections of New York City, and with the county clerk of New York County, were evidently deliberately false returns, for, although the election inspectors knew at noon of election day that 53 ballots had been stolen from the pile of unvoted ballots and had not been recovered, they failed

to report them as missing ballots in their election returns, but, on the contrary, reported the full number of unvoted ballots.

THIRTY-FIRST ELECTION DISTRICT OF THE SEVENTEENTH ASSEMBLY DISTRICT

The contestant contends that the poll of the thirty-first election district of the seventeenth assembly district should be rejected for the following reasons:

(*a*) Because the board of inspectors of said election district was illegally constituted and organized, and was therefore without authority to act.

(*b*) Because there was electioneering within the polling place and within the prohibited limit of 100 feet in said election district by means of banners and pictures of Bloom, the contestee, and by personal solicitation of his workers, in violation of the election laws of New York.

(*c*) Because the secrecy of the ballot was openly violated in said election district by the Democratic election officers, in violation of the election laws of New York.

(*d*) Because the Democratic inspectors of election deliberately tore, erased, and mutilated many ballots, thus violating the secrecy of the ballot and furnishing proof of a criminal conspiracy to corrupt voters, in violation of both the civil and criminal election laws of New York.

(*e*) Because such methods of intimidation were employed by the Democratic election officers and workers in said election district that the Republican officers and workers were prevented from properly performing their official duties, thus destroying freedom of official action and rendering unreliable the election returns from said district.

(*f*) Because the canvass of the ballots and the preparation of the tally sheets were in flagrant violation of the election laws of New York.

THIRTIETH ELECTION DISTRICT OF THE SEVENTEENTH ASSEMBLY DISTRICT

The contestant contends that the poll of the thirtieth election district of the seventeenth assembly district should be rejected for the following reasons:

(*a*) Because 34 ballots were stolen from the pile of unused or unvoted ballots and were voted for Sol Bloom, contestee, by what is known as shifting or substitution of ballots.

(*b*) Because there was a deliberately false and fraudulent return of votes by the board of inspectors of this election district.

TWENTY-NINTH ELECTION DISTRICT OF THE SEVENTEENTH ASSEMBLY DISTRICT

The contestant contends that the poll of the twenty-ninth election district of the seventeenth assembly district should be rejected for the following reasons:

(*a*) Because the board of inspectors of said districts was illegally constituted and organized and was, therefore, without authority to act.

(*b*) Because there was a violation in this district of the secrecy of the ballot as well as open corruption of voters with whisky and with money.

(*c*) Because there was illegal voting in this district by repeating, in which Democratic election officers and workers personally participated.

TWENTY-FIFTH ELECTION DISTRICT OF THE SEVENTEENTH ASSEMBLY DISTRICT

The contestant contends that the poll of the twenty-fifth election district of the seventeenth assembly district should be rejected for the following reasons:

(*a*) Because the board of inspectors was illegally constituted and organized and was therefore without authority to act.

(*b*) Because the record discloses the fact that there was a well-formed conspiracy in this district to carry the election for Bloom, the contestee, by fraud and intimidation. . . .

After a careful and exhaustive consideration of the evidence and hearings in this case the committee finds that all of said election districts are tainted with fraud. That in the twenty-third election district of the eleventh assembly district and in the thirtieth and thirty-first election districts of the seventeenth assembly district there was such an utter, complete, and reckless disregard of the provisions of the election laws of the State of New York involving the essentials of a valid election, and the returns of the election boards therein are so badly tainted with fraud that the truth is not deducible therefrom, and that it can be fairly said that there was no legal election held in the said election districts.

Consequently in accordance with the universally accepted principles of the law governing contested elections and in conformity with a long line of congressional precedents, from the Missouri case of Easton *v.* Scott in the Fourteenth Congress (Rowell's Dig. 68) down to and including the cases of Gill *v.* Dyer in the Sixty-third Congress, Wickersham *v.* Sulzer in the Sixty-fifth Congress, Tague *v.* Fitzgerald in the Sixty-sixth Congress, Farr *v.* McLane in the Sixty-sixth Congress, and Paul *v.* Harrison in the Sixty-seventh Congress, the committee is of the opinion that the entire returns of the twenty-third election district of the eleventh assembly district and the thirtieth and thirty-first districts of the seventeenth assembly district should be rejected.

Rejecting the returns from the above three precincts and deducting from the total votes of the contestant the three votes illegally cast for him and from the total votes of the contestee the 11 votes illegally cast for him in the remaining precincts of the district aforesaid, the result of the congressional election held in the nineteenth congressional district of the State of New York on January 30, 1923, would be as follows:

Walter M. Chandler, Republican, received 17,504 votes, and Sol Bloom, Democrat, received 17,280 votes, and the contestant is elected by a majority of 224 votes.

The committee therefore respectfully recommends to the House of Representatives the adoption of the following resolutions (H. Res. 254):

> *Resolved*, That Sol Bloom was not elected a Member of the House of Representatives from the nineteenth congressional district of the State of New York in this Congress and is not entitled to retain a seat herein.

> *Resolved,* That Walter M. Chandler was duly elected a Member of the House of Representatives from the nineteenth congressional district of the State of New York in this Congress and is entitled to a seat herein.

The following minority views were submitted by Mr Guinn Williams, of Texas; Mr. John H. Kerr, of North Carolina; and Mr. Heartsill Ragon, of Arkansas:

Report No. 224, Part 2

. . . At the request of the contestant, a recount of the votes cast at said election was had, pursuant to law. At this recount the contestee's majority was reduced to 126, counting those ballots which were conceded by each party to be undisputedly good, a goodly number being contested by both parties and put aside for the House Election Committee to pass upon, and upon investigation of these disputed ballots the House Election Committee determined that Sol Bloom was entitled to a net gain of 27 more, thus making Bloom's plurality, after two counts and an inspection by the committee, 153.

. . . This matter resolves itself into the question as to whether the contestant has offered evidence sufficient to establish the fact that he was deprived of his election upon the face of the returns by reason of frauds perpetrated in the twenty-third election precinct of the eleventh assembly district, and in the thirtieth and thirty-first election precincts of the seventeenth assembly district.

It is a well-accepted rule of law that fraud "which is criminal in its essence" and involves moral turpitude at least is never presumed but must be proven affirmatively; conversely, a party is not bound to disprove fraud either directly or constructively; it must be proven by the party alleging it. The presumption, if any, is against the existence of fraud and in favor of innocence, honesty, and fair dealing.

ARGUMENT

The contestant contends that the twenty-third election district of the eleventh assembly district should be rejected for the following reasons, viz:

> First. That the board of inspectors of said district were not properly organized and therefore had no authority to act.

What are the facts? In the precinct five inspectors of election designated under the statute by their political parties held this election—Webster, a Republican, who was in every way qualified, this is admitted; Grohol, a Republican, who was designated by his party to act, although he was not an elector or voter in New York City; and Levy and Elbern, Democrats, who had acted as inspectors in this polling place on every registration day but who were sworn for this day perhaps not strictly in accordance with the statutes, and Mrs. Josephine Born, who took Levy's place when he was called away about noon.

This House of Representatives is asked to reject the vote of this precinct, for the reason that Grohol, who had been designated by the Republican leaders, pursuant to law, to act as inspector, was not a resident, of the city of New York. This fact seems to be true, but wouldn't it be a monstrous proposition that a man recommended for appointment by his Republican organization and actually accepted and sworn in by a bipartisan board of elections, and who thereafter served through the election honestly and faithfully, should be used by his party as the instrument of unseating a successful opponent who was in no way responsible for his recommendation and appointment?

The two Democratic inspectors, Levy and Elbern, may have failed to take the oath in the manner required by the statute, but they had been acting throughout the registration, they were well known in the district, and they were de facto officials if technically not de jure ones; their acts as far as the public is concerned are as valid as the acts of an officer de jure. Can it be said that the contestant has been wronged or lost one vote by this "illegally constituted and organized" board of inspectors, as contended by him?

Mr. Webster, who was admittedly qualified, had the authority to have sworn in each of these officers and thus qualified them fully, or he could have constituted an entirely new board, under the New York statute, if he had wished to have done so. Levy and Elbern and Mrs. Born, who were sworn in by one of them, were de facto officials under all the authorities of the State and of Congress.

> An election held by one regularly appointed inspector and one officer de facto acting under color of authority is valid. (Smith v. Elliott, 44th Cong., Mobley, 718–722.)

In People *v.* Cook (8 N.Y. 87) the Court of Appeals of the State of New York said:

> The first objection I shall consider relates to the inspectors of election. It appears by the record that the inspectors who opened the polls in the morning were not regularly sworn and that they were appointed by the supervisors, town clerk, and a single justice "inspectors of election for the second district of the town of Williamsburg to act until others are appointed." It was dated November 4, 1851. It appears that there were inspectors elected for that district, but that they were not present at the opening of the polls. There can be no doubt that this appointment was a colorable authority for these inspectors, and that their acts in that capacity were valid, so far as third persons were concerned; their omission to take the oath in due form did not invalidate their acts. . . . An officer de facto is one who comes into office by color of a legal appointment or election; his acts in that capacity are as valid, so far as the public is concerned, as the acts of an officer de jure; his title can not be inquired into collaterally. . . .

> Had the sheriff or constable arrested a disorderly person under authority of either of the boards of inspectors, who were merely such de facto, he would have been protected. The person of the voter is as securely guarded under authority of inspectors de facto as of inspectors de jure; a challenged voter swearing falsely before a de facto board of inspectors is as much liable to punishment under the statute as if the oath had been administered by inspectors de jure.

In Barnes *v.* Adams (41st Cong., 2 Bart. 765) it was said:

> There is, however, a principle of law which your committee believes to be well settled by judicial decisions and most salutary in its operations, which is conclusive of this point as well as of several other points in this case. It is this: That in order to give validity to the official acts of an officer of election, so far as they affect third parties or the public, and in the absence of fraud, it is only necessary that such officer shall have color of authority. It is sufficient if he be an officer de facto and not a mere usurper.

In Eggleston *v.* Strader (41st Cong., 2 Bart. 897–904) it was said:

> It takes but little to constitute an officer de facto as affects the right of the public. The exercise of apparent authority under color of right, thus inviting public trust and negativing the idea of usurpation, is sufficient.

And also this:

> It is well settled in law that so far as the public is concerned the acts of one who claims to be a public officer, judicial or ministerial, under a show of title or color of right will be sustained. Such a person is an officer in fact if not in law, and innocent parties or the public will be protected in so considering or trusting him.

In Birch *v.* Van Horn (40th Cong., 2 Bart. 206), where a supervisor of registration was not qualified to hold the office, it was said:

> The committee are of the opinion that his acts as such supervisor can not be regarded as void, so as to affect the legality of the votes given at the election; that, having come into the office under all the forms and requirements of the law, he is at least a good officer de facto whose acts are not to be questioned in a collateral proceeding but only by some proceeding bringing his title to the office directly in question.

The case of Sheafe *v.* Tillman, cited by the contestant, does not apply. In that case the committee held that the coroner was not even an officer de facto, for he did not hold his office under color of legal authority. He was a mere usurper and all his acts were void. This is clearly not the fact in the case of Grohol, who, although not qualified, was duly appointed and fully

and properly performed his duties, nor in the cases of Levy and Elbern, who were qualified but not properly sworn.

> (Second.) That 53 ballots were stolen from the pile of unused or unvoted ballots and undoubtedly voted for the contestee, Sol Bloom, by what is called shifting or substitution of ballots.

The 53 ballots which appear to have been missing from the bottom of the pile, 17 of which were found by some one in a barber's chair in the back part of the polling place, can not be chargeable to the contestee or to the acts of his friends; there is absolutely no proof that one of them was deposited in the ballot box; there is absolutely no proof that either of them were taken out of the pile for a fraudulent purpose; each and every one of the inspectors swear that they knew nothing of the removal; the evidence discloses that Grohol, the Republican, "handled the ballots practically all day." It would have been utterly impossible for them to have been removed and shifted or put into the ballot box in the presence of the four election inspectors, the watchers, the challengers, the captains, and police, several of whom were there all the while. There can be no sanctity attached to these unused ballots. The overpowering fact is that there were 275 voters who registered their names and voted in this box and there were 275 stubs detached from their ballots and deposited in the stub box and there were 275 votes counted out of this box. To contend that some of those removed unvoted ballots were fraudulently cast in this precinct is based upon not a scintilla of fact or evidence. The fertile mind of the contestant, who has established no fact of fraud in this matter by any well-accepted rule of law or common sense, has a suspicion that some one was attempting to wrong and was wronging him. We respectfully submit that his case is founded upon circumstances which do not rise even to the dignity of a well-founded suspicion; and yet this House of Representatives, constituted by a large number of lawyers who know the rules and equities of their profession, are called upon to do an act so manifestly unjust that to even contemplate it should arouse the spirit of any just and fair man. It would be just as fair for the contestee to suspicion that Grohol was sent into this Democratic precinct by the friends of the contestant and not qualified as contended by contestant, for the purpose of creating this irregularity or the perpetration of a fraud, and then he would be prepared for this attack upon this precinct.

The vote of this district as analyzed from the enrollment and as compared with the adjoining district, shows that Mr. Bloom received only 60 per cent of the enrolled Democratic vote, whereas Mr. Chandler received 90 per cent of the enrolled Republican vote. It shows that Bloom received only 115 plurality in this district while he received a plurality of 130 and 132 in the two adjoining districts of similar character. Bloom's majority was considerably less in this district than Mr. Marx received at the November election before. It was considerably less than the majority recorded for the Democratic candidate for State senator, assemblyman, and alderman in the general election of 1922 and 1923; it shows that the vote east and counted at the special election was absolutely normal; it negatives the idea that any of these unvoted ballots went into the box.

Romaine *v.* Meyer (55th Cong., Rept. 1521) is determinative of this point.

> In the absence of evidence that any official ballot fraudulently or otherwise obtained was voted, it can not be held that the existence of such outstanding ballots in any way affected the result of the election.
>
> Unless the frauds and irregularities charged are proven, and unless it is further shown that enough votes were affected so as to change the result, a poll can not be rejected. (Evans *v.* Turner, 66th Cong.; Wilson *v.* Lassiter, 57th Cong.; Duffy *v.* Mason, 46th Cong.)

We submit that there is no proof whatsoever that a fraud was committed, that it tainted the box, or that it affected enough votes to change the result.

> (Third.) That there were cast and counted illegal voters on a large scale.

Upon investigation of the evidence the House will find that this voting of "illegal voters on a large scale" consists in four people voting under the name of Feldman—a Mr. Feldman and his three sons. There is not the slightest proof that Bloom's friends had anything to do with procuring these illegal votes, assuming that they were illegal, and there is not the slightest proof as to how or for whom these votes were cast. If they are found to be illegal, the box can be easily purged of them by deducting them from the votes of the candidates proportionately. (Wickersham *v.* Grigsby, 66th Cong.)

> (Fourth.) That there was electioneering within the prohibited space by Democratic election officials, and that there was a sign with Bloom's picture on it at or near the voting place.

The evidence is not sufficient to warrant the finding that there was electioneering on the part of the election officials; certainly no complaint was made either by the officer present or by the board of election, which was in session all day to hear complaints and correct all errors and settle controversies. The great dereliction seems to be in having a likeness of the contestee on a movable sign near the polling place. The minority is inclined to think it was there. The Republican leader, Mr. Levis, in the district called the attention of some official, and with his aid the banner and the pictures were removed. It may have been a violation of the law to have exhibited these pictures so near the polling place, and the officials who allowed such may have been amenable to prosecution, but certainly this is no grounds upon which you should disfranchise 275 bona fide electors. (See Wigginton *v.* Pacheco, 45th Cong.)

> (Fifth.) That unsworn persons handled the ballots.

The evidence discloses that Mr. Grohol folded and handled the ballots most of the day; when the count was begun the watchers, both Republican and Democrat, would look at disputed ballots; they had a right to do so. Grohol testified that there was no misconduct of any kind when the ballots

were being counted; and Mr. Coyne testified that he saw every ballot taken out of the box by one of the inspectors, in full view of every other inspector, and counted and tallied, and "that the account and tally were correct in every way." Coyne was the officer who was assigned to this precinct to keep order and see that the election was conducted properly. Suppose, for argument, that when a ballot was being discussed some one took it and looked at it, would this fact invalidate a poll and be any just reason to disfranchise the electors of this precinct? We submit that this is too trivial to be considered by this House, and yet the contestant insists that this is a serious earmark of fraud. (See Hurd *v.* Romeis, 49th Cong. Carney *v.* Smith, 63d Cong.; Roberts *v.* Calvert, 98 N.C. 580).

> (Sixth.) That certain Republican workers were intimidated and run away.

There is no evidence whatever of any intimidation of an inspector or a voter. Grohol himself says that he was not intimidated, and this serious offense charged to the contestee consisted in the running away of four Italian ruffians who came to the precinct from some other section of New York City by some men who were not identified as the friends of Bloom. They were doubtless police officers, but certainly this could not be chargeable to Bloom; he had no control over them. Not a voter was intimidated, and we respectfully submit that the intimidation of a voter is the only matter Congress will take cognizance of.

> (Seventh.) That the Democratic inspector and captain was under the influence of liquor to the extent that the freedom of election was destroyed and intimidation resulted.

The Republican inspector upon whose evidence the contestant relied upon to make out his ease entirely in respect to fraud in the twenty-third election precinct in the eleventh assembly district—we refer to Mr. Grohol—testified that "there was much social disorder" and that the Democratic captain said "he could lick anybody in the place, and appeared to be under the influence of spirits," but the witness further testified that he, Grohol, was not intimidated. This contention, the minority respectfully submits, resolves itself into the fact that one or more witnesses testified that they "smelled liquor on Elbern and Rosenberg's breath"; and this House is asked to deprive Mr. Bloom of his seat herein because, forsooth, Chandler's witnesses smelled liquor on a man's breath. No liquor was given a voter, and no officer charged that the freedom of election was interfered with in any manner whatsoever. (See Norris *v.* Handley, 42d Cong.; Chaves *v.* Clever, 40th Cong.; Bromberg *v.* Harolds, 44th Cong.; Harrison *v.* Davis, 36th Cong.)

> (Eighth.) That this poll should be rejected because the ballots were improperly counted.

The method of counting cast ballots is directory; any method which will ascertain the true number cast is sufficient; the count was conducted and agreed to by the representatives of both parties; the true number was tab-

ulated, and the recount disclosed that the first count was correct; certainly the contestee can not be held responsible for the failure of the officers to do their duty properly; no fraud can possibly be attached to this dereliction of the election officers if in this instance they failed to strictly comply with the law.

> (Ninth.) That this poll should be rejected, the twenty-third election precinct in the eleventh assembly district, because the inspectors failed to report the 53 missing ballots.

The failure of the inspectors to report the 53 missing ballots when they made their return did not affect the result of the vote in this precinct. They reported the exact vote found in the box. We submit again that the provision of the law which required them to report the missing ballots and the unused ones was directory only and these returns can not be legally rejected for this reason. (Carney *v.* Smith, 63d Cong.; Gaylord *v.* Carey, 64th Cong.; Larrazola *v.* Andrews, 60th Cong.)

A party can not be held responsible for the mistakes and omissions of election officers chosen necessarily from all classes of persons. There were more than a thousand election officers who held this special election; it is not expected that none of them made any mistakes. It is sufficient that the result was not affected by such mistakes. (Barnes *v.* Adams, 41st Cong.)

THIRTY-FIRST ELECTION DISTRICT OF THE SEVENTEENTH ASSEMBLY DISTRICT

(*a*) The allegation is that this election board was illegally constituted in that Rothchilds, one of the inspectors, had been indicted in 1920, and further, that the board was organized before one of the inspectors arrived. No question is raised as to the qualification of three of the inspectors; Rothchilds is attacked because he had been once indicted. He was never tried for any offense and never convicted. Neither under the law nor on principle was this inspector, Rothchilds, disqualified; an indictment is a mere accusation and does not stamp a man as having a bad character or disqualify him for holding an office. Rothchilds was a de jure inspector. The evidence discloses that the board was organized before anyone offered to vote, and that no one voted until all four inspectors were acting. Certainly upon this position this poll should not be rejected.

(*b*) The charge of electioneering in this precinct was based on the statement of a Republican worker that a Democratic captain handed out a few cigars and cards to some voters. If this is true, under the laws of New York it would only constitute a misdemeanor, and, as any fair mind would readily see, would not affect the integrity of the ballot box, because these party captains are not election officers. But this statement is flatly contradicted by three reputable witnesses and two police officers. No effort is made to connect this instance with any effect that it had on the results of the election. Under the authority of Congress it could not vitiate a poll. (Wiggington *v.* Pacheo, 45th Cong.)

(*c*) The charge is made that one of the inspectors of election squeezed the ballot in such a way as to see how it was marked and as a result kept a

private tally, thereby violating the secrecy of the ballot. The witness testifying discredits his own testimony. He states at 3 o'clock in the afternoon he was permitted to look at this tally and it showed 73 for Chandler and 40 for the Socialist candidate. The fact is that even after the recount Chandler only received 65 votes and the Socialist 14. The undisputed testimony is that the heaviest voting was in the late afternoon, and it would be preposterous to say that Chandler received no votes between 3 o'clock and 6 o'clock and the Socialist never had over 14 votes. It is foolish reasoning to say that a man bent upon the perpetration of some crooked enterprise in an election would voluntarily call and show the opposing side the very methods by which he was accomplishing his purposes. Viewing it from the most serious aspect of the contestant's charge it would have no other effect than to subject the offending official to punishment for a misdemeanor, and certainly would not vitiate the ballot. This story, however, is emphatically denied by two reputable witnesses. It is not here shown, if such an incident occurred, that it interfered with the freedom of the election or kept anyone from the polls, and therefore could not have tainted the election with fraud.

(*d*) The other charge that ballots were mutilated by inspectors tearing the stubs off jaggedly is equally discredited by the physical feet that the examination of the ballots on the recount disclosed that of all the ballots east only five were held out as void in this precinct, and that not one of these five was mutilated.

(*e*) The intimidation charged by the contestant did not relate to the intimidation of voters, but of the Republican election officials. The two officials who it is claimed were intimidated expressly contend that they were neither threatened nor put in fear by anyone, and there were two police officers present, and that not a single complaint was made to these officers. We can not attach as much importance to the intimidation which they seek to prove in this precinct as we did to that which they sought to prove in the twenty-third of the eleventh heretofore discussed.

(*f*) There was a slight incorrectness in the count of the ballots in this precinct. However, no importance can be attached to this because the recount of the ballots by the contestant and contestee and their attorneys effected a correction, the purpose a recount is supposed to serve. It is disclosed that there was a great deal of wrangling between the inspectors as to whether certain ballots were good or bad, and also as to whether or not one of the inspectors called the ballots too rapidly. The result was that the two tally clerks arrived at different results. This feature of the contestant's charge has been completely remedied by the recount and, therefore, can under no circumstances vitiate this ballot. We submit that this precinct should not be thrown out.

THIRTIETH ELECTION DISTRICT OF THE SEVENTEENTH ASSEMBLY DISTRICT

It is our opinion that these grounds for contest should not be considered because they were not included in the original notice of contest. They were added in an amended notice of contest two months after the time to serve a notice of contest had expired. The statutes clearly provide that the notice of contest must be filed within 30 days after the election. The contestant

served notice of contest on contestee March 3, 1923. Contestee answered and then, on May 10, 1923, he filed this amended notice of contest.

(*a* and *b*) Considering the merits of this particular district, however, we find that during the time the parties and their attorneys were recounting the ballots in the offices of the board of election in downtown New York they found among the unused ballots of this district that 34 were missing. While the New York statutes require the preservation of unused ballots, yet it is self-evident that they can not and would not have the sanctity accorded to a used ballot because they serve no useful purpose. We can not say that this precinct should be thrown out because three months after the election 34 unused ballots were found to be missing. There is no testimony to show that they were missing on the day of the election or at the time the returns were made. The only time they were discovered as missing was three months after the election was over. Without a word of testimony as to when or how these ballots disappeared, or by whom they were taken or lost, the majority of the committee have indulged themselves in the conclusion that the disappearance of these ballots had something to do with tainting the poll with fraud. The disappearance of these ballots is brought no closer to this polling place than several city miles and no closer in time to the election than three months. It can with equal propriety be charged that these ballots were missing by the efforts of Chandler's supporters as to charge it to the Bloom supporters.

A weak attempt is made to establish a substitution of ballots in this district by a twist of legal procedure the sanction of which is found in the decision of no court anywhere. The contestant and two other parties seek to establish the substitution of ballots in this precinct by the impeachment of their own witness. They used an old Italian barber as a witness and sought to draw from him that he had told these other persons that he had observed one of the inspectors pocketing ballots cast. He denied making the statement or any other statement that would lead to an inference of the kind suggested. Contestant and his other two witnesses then took the stand and testified that they were told this by this Italian barber. In other words, we are asked to accept as true the unsworn statement of this barber to establish a fact which he swears himself is not true. No rule of evidence could be tortured into a construction which would render admissible this testimony as tending to establish any fact. Any irregularities in the returns in this district are of such minor importance as not to justify a discussion on our part, or they were corrected by the recount.

It is interesting to know that Robert Oppenheim, the Republican leader of the seventeenth assembly district, in which are located the thirtieth and thirty-first election districts, testified that he was at this precinct and the thirty-first several times during the day, and that he had workers and captains there all the time; that he did not see anything in the district upon this election day which warranted his belief that anything wrong was being done or any fraud being perpetrated or any irregularities taking place, and that as far as his knowledge and information were concerned such did not occur. If any fraud such as would justify the throwing out of this box were perpetrated in this assembly district, it is astounding that the party leader

of the district would not know anything of it, much less not even hear of it. . . .

Upon a legal canvass of the votes cast at this special election in the nineteenth congressional district in the State of New York, the contestee, Sol Bloom, received a plurality of 191 votes over the contestant; upon a recount of said votes upon conceded lawful votes, votes agreed by both parties to be in all respects legal votes, the contestee had a plurality of 126; the election committee increased this plurality upon thorough investigation to 153 and then reduced this 8 votes, leaving a net plurality for the contestee of 145.

To overcome this majority of 145 votes, which contestee has over the contestant, the committee rejects the votes cast in the twenty-third election precinct of the eleventh assembly district, and the votes cast in the thirtieth and thirty-first election precincts of the seventeenth assembly district. These three precincts had given Bloom 369 more votes than Chandler had received in said districts, and in this manner declared Chandler elected.

The election inspectors who held this election and who counted the ballots cast at the several precincts, there being 156 thereof, threw out more than 600 ballots which were attempted to be cast for Mr. Bloom, because these ballots were marked improperly, though they clearly disclosed that the voter in good faith intended to vote for Mr. Bloom; they technically complied with the law and the New York statute. We make no protest as to this, but in all fairness we invoke the right to compel the contestant to also comply with the law and the well-accepted rules thereof when he undertakes to overcome the presumption in favor of the legality of the returns of this election, which certified that he was defeated by the contestee by his allegation of fraud and irregularities. Unless he does so to the satisfaction of this House, by evidence which is strong, clear, and convincing, and carries with it a conviction of the truth of his charges, he should not avail.

The undersigned members of the committee therefore recommend the adoption of the following resolution:

> *Resolved*, That Walter M. Chandler was not elected a Representative to the Sixty-eighth Congress from the nineteenth congressional district of the State of New York; and
>
> *Resolved*, That Sol Bloom was elected a Representative to the Sixty-eighth Congress from the nineteenth congressional district of the State of New York.

Privileged resolution (H. Res. 254) agreed to as amended (209 yeas to 198 nays with 3 "present") after extended debate in which contestant was permitted to participate and after adoption of substitute (210 yeas to 198 nays with 5 "present") declaring contestee entitled to a seat and declaring contestant not so entitled [65 CONG. REC. 6034, 68th Cong. 1st Sess., Apr. 10, 1924; H. Jour. 418, 419].

**§ 4.3 Clark v Moore, 1st Congressional District of Georgia.**

*Evidence.*—Contestant failed to offer sufficient proof of allegations of fraud and conspiracy to defraud by election officials of contestee's party.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 2 submitted by Mr. John M. Nelson, of Wisconsin, on Mar. 26, 1924, follows:

Report No. 367

CONTESTED ELECTION CASE, CLARK V MOORE

The basic contention of the contestant in this case is that because the Democratic Party controlled all State and county officers that a monocratic form of government was thus set up, making it impossible for a Republican candidate to have any watchers at the polls or in any other way to secure a fair opportunity to win an election. On this ground contestant desires the results of the election vitiated and the seat of the contestee declared vacant in the House of Representatives.

The committee can find no justification in evidence or in practice for the disfranchisement of the voters of the first congressional district of Georgia merely because that district is dominantly Democratic in its politics.

The committee finds no evidence to support allegations 1, 2, 3, and 4 of contestant that the State and county officials were confederated in a conspiracy to deprive him of the privilege of running as a candidate for Congress from the first district.

The committee finds no evidence to support the allegation of contestant that the actions of the county election officials in the counties of the first district were such as to vitiate the results of the election.

The committee finds no evidence to support the allegation of the contestant that county officials in refusing to distribute contestant's blank ballots committed an act which vitiated the results of the election.

The committee finds no evidence to support the allegation of contestant that the election was void because of disqualification of the election managers in the various counties of the first district.

The committee finds no evidence to sustain the allegation of the contestant that the election has not been completed under the laws of Georgia as they were at that time.

The committee finds no evidence to support the allegation that the actions of the chairman of the State Democratic executive committee of Georgia were such as to vitiate the results of the election.

The committee finds no evidence to support the allegation of the contestant that the managers of elections were not qualified by law to so act; that there was repeating and other fraudulent voting practices; that any votes cast for contestant were deliberately destroyed uncounted.

The committee finds that the contestant in his brief has been reckless and extravagant in his use of language and in making charges, and that the contestant offers assumption instead of evidence to prove his contention.

The contestant avers that in some of the precincts the ballots were burned and in others that they were lost. He offers no evidence to show that any of the ballots alleged to have been burned or lost were cast for him, but bases his claim that they were cast for him on the ground that if they had been cast for the Democratic candidate they would not have been burned or lost.

The contestant's allegation that in some of the counties many of the polling places were not open, so the voters could cast their ballot, remains unproven, and on the contrary the evidence shows that there was ample opportunity for the voters to cast their ballots if they chose to do so.

The contestant's allegation that 600 ballots cast by colored voters in the city of Savannah were cast for him is unproven, the only evidence that such was the case being the assumption by three colored witnesses that the colored voters of Savannah naturally would vote for a Republican candidate.

The contestant has utterly failed to show, even if he were allowed all of the votes which he claims were cast for him and were burned or lost, that he would have a majority of the votes cast in the district; but in fact the contestee would have a large plurality over the contestant in any event.

Although the contestant has failed to show cause why the election should be voided, or why the contestee's title to his seat in the House of Representatives should be invalidated, even if the contestee's seat were vacated by the committee, there is nothing in the evidence to show that the contestant would be entitled to it.

It is difficult to follow the reasoning of the contestant since his brief is made up of such allegations as the following:

> Hope that the fires of loyalty and devotion to constitutional laws and its enforcement may be rekindled; that the viperous political fangs of an idiocratic monocracy shall no longer be tolerated, by crime, treachery, and treason, to paralyze the decadent people and state, it has so long deluded and enslaved, but that it and the system shall be wrenched from the politic heart of Georgia, has impelled this contest.

And further the following:

> When, where, and why has the reward of fraud, crime, conspiracy, and treason been held to produce the domination of vice, here—produce a vacant seat in the Sixty-eighth Congress of the United States? Contestant now and here defies contestee to offer such precedent or rule of law. When he does, then it will have come to pass that a sufficiency of crime and treason, and the criminals and traitors, thereby produced, will automatically vacate, at their pleasure, every seat in the upper and lower House of Congress, and all Government will end.

The above quotations are typical of the nature of the contestant's brief in this case, and your committee is of the opinion that such loose, extravagant, and unfounded charges being made the basis for an election contest with the consequent expense to the Government should be discouraged in the future.

SUMMARY AND CONCLUSION

Your committee therefore finds that the contestant has failed to prove the allegations contained in his brief, that there is no evidence warranting the rejection of the votes of any of the precincts of the district; and that the contestee, R. Lee Moore, was duly and legally elected a Member of the House of Representatives from the first district of Georgia. For the above reason your committee recommends the adoption of the following resolutions:

> *Resolved,* That Don H. Clark was not elected a Member of the House of Representatives in the Sixty-eighth Congress from the first congressional district of the State of Georgia, and is not entitled to a seat herein.
>
> *Resolved,* That R. Lee Moore was duly elected a Member of the House of Representatives in the Sixty-eighth Congress from the first congressional district of Georgia, and is entitled to retain his seat herein.

Privileged resolution (H. Res. 340) agreed to by voice vote without debate [65 CONG. REC. 10323, 68th Cong. 1st Sess., June 3, 1924; H. Jour. 369].

**§ 4.4 Claim of E. W. Cole to Seat, At Large, Texas.**

*Apportionment.*—The right of a Member-elect with regular credentials to a seat, where the state's representation would thereby be in excess of the state entitlement under existing law, was denied by the House.

The constitutional provision requiring reapportionment by act of Congress after each decennial census was held to be discretionary as to time for enactment, and to preclude the House from itself increasing its total membership and creating an extra unfunded seat.

Report adverse to the claim of a Member-elect, who was not seated.

Report of Committee on Elections No. 2 submitted by Mr. John M. Nelson, of Wisconsin, on Mar. 29, 1924, follows:

Report No. 398

CLAIM OF E. W. COLE TO SEAT

STATEMENT OF THE CASE

Under the constitutional provision providing for representation of the States in the House of Representatives on a basis of numerical population, and basing its action on the census of 1920, the State of Texas proceeded to elect a Representative at Large on the ground that the census of 1920 entitles the State of Texas to one more Representative than it now has in Congress, making the number 19 instead of 18.

In May, 1922, E. W. Cole, of Austin, Tex., had his name placed on the ballot to be voted on in the primary election in the selection of Democratic nominees for various offices of the State as well as for Representative at Large in Congress. Mr. Cole secured recognition on the ballot through the Democratic State executive committee according to his brief filed with his claim. He further alleges that in July, 1922, at the primary election he received practically the unanimous vote of the Democratic Party of Texas for the nomination for the position of Representative at Large.

The Governor of the State of Texas at the proper time, it is alleged, issued his proclamation calling for the election of the various Members of Congress and the State officers in November, 1922, and among other provisions included in the proclamation was one for the election of a Representative at Large in Congress for the State of Texas.

Claimant alleges that his name was duly placed upon the Democratic ballot as the candidate for that party in the general election held in November, 1922, and that the Republican Party of the State of Texas had placed upon its ballot as a candidate for the same office the name of Herbert Peairs.

Claimant alleges that in the election November, 1922, the said Herbert Peairs received 46,048 votes and that claimant received 265,317 votes.

Claimant further alleges that thereafter the election board of Texas canvassed the result of the said general election, and declared that E. W. Cole, the claimant, was duly elected as Representative at Large from the State of Texas, and that thereafter in due time and form the Hon. Pat. M. Neff, Governor of the State of Texas, issued, signed, and delivered a certificate of election to claimant as Representative at Large for the State of Texas, and that said certificate of election was duly filed with the Clerk of the House of Representatives of the Congress of the United States. Claimant further alleges that the Clerk of the House of Representatives received and is holding said certificate of election, but has refused to file the same or to recognize the claims of the claimant for a seat in the House of Representatives of Congress and has refused to recognize the appointment of a secretary and other privileges to which the said E. W. Cole would be entitled as a Representative in the House of Representatives in the Sixty-eighth Congress.

All of which allegations your committee assumes to be true, having taken no evidence concerning them.

Claimant's counsel cites in support of the claim Article I, Section II, Subdivision III of the Constitution of the United States, which reads as follows:

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States and within every subsequent term of ten years, in such manner as they shall by law direct.

Claimant's counsel further cites Section II of Article XIV of the Constitution of the United States, in which the following language is found:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive officers of a State or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being 21 years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

It may be observed that male citizens only are referred to in this section of the Constitution, but by the nineteenth amendment to the Federal Constitution women were enfranchised and now those constitutional provisions have to be read in connection with the nineteenth amendment.

Claimant sets up the theory that not only is the direction for taking the census made mandatory in the Constitution, but that the action of Congress to enact a reapportionment act based upon each succeeding census is also mandatory.

Your committee of course agrees that taking of the census is made mandatory by the Constitution; but while it be true that for a hundred years the Congress has at its first session following the taking of a census enacted a reapportionment act, the time of performing this duty is not made mandatory by the Constitution but remains discretionary with the Congress.

While it is true that some color may be given a claim that long-established custom has fixed that time for Congress to pass a reapportionment act the first session of Congress following the taking of the census, it still remains custom and not a constitutional provision nevertheless.

Your committee sympathizes with the view that since no explicit time is set by the Constitution in which Congress shall enact a reapportionment act following the taking of a census, the framers of the Constitution had in mind that Congress should within a reasonable time after the taking of the census make a reapportionment. Your committee also sympathizes with the view

that the long-established custom of the Congress in providing for a reapportionment at the first session following the taking of the census lends some weight to the claim that this practice has established that time as being a reasonable time within the meaning of the Constitution.

Claimant cites a resolution by the Texas Legislature in which the legislature petitions Congress to seat claimant on the ground that the official census of 1920 showed the representative population of Texas to be 4,663,228, the legislature calling attention to the fact that the official census of 1920 shows the representative population of the United States to be 105,371,598 and reciting the fact that the present or Sixty-eighth Congress came into existence on March 4, 1923, and that the membership of the House has not been changed and still remains 435.

Your committee has no reason to question the facts as set forth in the petition of the Texas State Legislature.

The situation presented here, however, brings up the question of whether or not it is incumbent upon Congress as a duty to enact a reapportionment act at its first session following a taking of the census. That is a matter for the Congress and not this committee to pass upon.

In the view of the committee two insurmountable obstacles to the seating of claimant obtrude themselves.

The first is: The number of Representatives fixed by an act of the Congress in 1913, based upon the official census of 1911, is 435. That act of Congress was passed by the House, then by the Senate, and was signed by the President of the United States. Your committee is of the opinion that the House of Representatives alone could not amend or modify an act of the whole Congress by increasing the membership of the House of Representatives to 436 without the act of the House being passed upon by the United States Senate and the President of the United States. Consonant with that view, then, your committee is of the opinion that if this claimant were to be seated he would have to be seated through an act of Congress to increase the membership of the House to 436.

The second obstacle is: Even though the House might attempt by its own act and independently of the Senate and of the President of the United States to seat claimant, thereby increasing the membership of the House by one Member and increasing the representation of the State of Texas by one, there would be no fund with which to pay the salary, clerk hire, mileage, and other perquisites and expenses of claimant, because the appropriation from which salaries, clerk hire, mileage, and other expenses of Members of the House of Representatives is paid is an appropriation passed by an act of the whole Congress and approved by the President of the United States, and therefore, even though claimant were seated, his salary and perquisites would have to be paid by a special act of Congress.

Claimant cites in support of his claim the case of F. F. Lowe, quoted in the Thirty-seventh Congress, second session, House of Representatives Report No. 79 (U.S. House Reports, vol. 3, 37th Cong., 2d sess.), which case was substantially as follows:

A memorial was based upon the alleged right of California to three Representatives in the Thirty-seventh Congress. By a special provision of a stat-

ute enacted July 30, 1852, it was provided that California should have two Representatives until a new apportionment should take effect. But that State, believing that the apportionment based on the Eighth Census had already taken effect, did at a general election elect three persons to represent the State in Congress. Two of the persons elected were duly seated, while the third, F. F. Lowe, was denied a seat, so that the case in point does not sustain the claim of E. W. Cole, but operates to deny his claim, since the committee authorized to consider the Lowe case came to the conclusion, which your committee now holds, that the proper procedure, where a State believing itself entitled to more Representatives than the number fixed by an apportionment act of the Congress elects a Representative at large, is for such Representative at large to be seated by an act of Congress and not by an action solely of the House.

Your committee is of the opinion that to attempt to settle questions of the nature involved in this case by seating the claimant, would be to disorganize the House of Representatives. It would bring up other questions, such as the action to be taken in the cases of States which are now overrepresented, due to decrease in their population.

Your committee is of the opinion that in cases where States elect Representatives at large in the belief that such States are entitled to greater representation than they now have, the proper procedure is for such claimants to find their remedy through a bill presented to the Congress for action rather than through a report from an elections committee.

Your committee understands that the claimant in this case has caused a bill to be introduced to increase the membership of the House by one Member and to seat claimant. This is a matter for the Congress to pass upon and does not fall within the scope of this committee's functions.

Therefore, your committee recommends that the following resolution be adopted by the House of Representatives:

> *Resolved,* That E. W. Cole is not entitled to a seat in this House as a Representative from the State of Texas in the Sixty-eighth Congress.

Privileged resolution (H. Res. 341) agreed to by voice vote without debate [65 CONG. REC. 10324, 68th Cong. 1st Sess., June 3, 1924; H. Jour. 636].

**§ 4.5 Gorman v Buckley, 6th Congressional District of Illinois.**

*Evidence* not having been forwarded to the House by the official appointed by contestant to take testimony within the time required by an elections committee rule, contestant was held not to have standing to institute the contest.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 3 submitted by Mr. Richard N. Elliott, of Indiana, on May 13, 1924, follows:

Report No. 722

CONTESTED ELECTION CASE, GORMAN v BUCKLEY

STATEMENT OF THE CASE

At the general election held in the sixth congressional district of the State of Illinois on November 7, 1922, according to the official returns, James R. Buckley, Democratic candidate, received 58,928 votes, John J. Gorman, Republican candidate, received 58,886 votes, and John S. Martin, Socialist candidate, received 4,341 votes. As a result of these returns James R. Buckley, contestee, was declared elected by a plurality of 42 votes over his Republican opponent, John J. Gorman, and a certificate of election was duly issued to him by the secretary of the State of Illinois. On January 2, 1923, the contestant, in accordance with law, served on the contestee a notice of contest in which it was alleged that errors, mistakes, and irregularities had been committed in said election and in the counting of the ballots in various precincts in said congressional district. The contestant claimed that a recount of the votes cast in the above precincts would disclose that the contestant was duly and legally elected.

On January 27, 1923, the contestee served on the contestant an answer denying all of the allegations contained in contestant's notice of contest.

WORK OF THE COMMITTEE

The testimony in the case was duly printed and the contestant filed an abstract of record and also a printed brief and argument. The contestee filed his brief and the following motion:

MOTION TO STRIKE DEPOSITIONS FROM THE RECORD

*To the honorable the House of Representatives of the Sixty-eighth Congress of the United States:*

> Now comes James R. Buckley, contestee herein, by William Rothman, his attorney, and moves that the depositions herein and each of them filed herein by the commissioners respectively designated by the parties to hear and take the testimony be stricken from the record, on the ground that said commissioners failed to file the said depositions with the Clerk of this House, "without unnecessary delay" after the taking of the same was completed as required by section 127 of the Revised Statutes as amended, in that the same were not filed within 30 days after the completion of the taking of said testimony as required by the rules of the Committee on Elections of this honorable House; and in this connection the contestee respectfully represents that the taking of testimony herein was completed on April 28, 1923, at the hour of 12:30 o'clock p.m., at which time the further hearing of the said cause was adjourned sine die; that the only further proceedings had in said cause subsequent to said April 28, 1923, were hearings which were had before his honor, Judge Wilkerson,

in the United States district court, which were had on June 2 and June 4, 1923; and that no further proceedings of any kind or nature were had in the said cause subsequent to said June 4, 1923; and that the depositions filed herein by the commissioner designated by the contestant were filed with the Clerk of this honorable House on, to wit, November 5, A.D. 1923, more than 191 days following the completion of the taking of testimony and more than 154 days after the date when the last proceedings of any sort were had in said contest.

Dated at Chicago, Ill., November 20, 1923.

Hearings were conducted by the committee on the 21st and 22d of April, at which time the contestant was present by himself and counsel, and the contestee was present by himself and counsel.

FINDINGS OF FACT

The contestee's answer was served on contestant January 27, 1923. The act of Congress approved March 2, 1875 (U.S. Stat. L., vol. 18, ch. 119, p. 338), provides that in all contested-election cases the time allowed for taking testimony shall be 90 days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first 40 days, the returned Member during the succeeding 40 days, and the contestant may take testimony in rebuttal only during the remaining 10 days of said period.

In this case, therefore, the contestant, under said law, was allowed until March 9 in which to take his testimony in chief and the law required that the taking of all testimony should be completed on April 27, 1923. As a matter of fact, however, the contestant took only a part of his testimony in chief in the first 40 days, which expired on the 9th day of March, 1923. The contestee took no testimony in the next 40 days. During the 10-day period at the end of the 90 days the contestant took some additional testimony, which was not in rebuttal, but was intended as testimony in chief. The testimony in this case was filed with the Hon. William Tyler Page, Clerk of the House of Representatives, on the 5th day of November, 1923.

CONCLUSIONS OF LAW

Section 107 of the Revised Statutes of the United States as amended by the act of March 2, 1875, explicitly provides that all testimony in contested-election cases shall be taken within 90 days from the date on which the answer of the contestee is served upon the contestant, and that all officers taking testimony to be used in a contested-election case, whether by depositions or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward same by mail or express, addressed to the Clerk of the House of Representatives of the United States, Washington, D.C.

Rule 8 of the rules of the Committee on Elections in the House of Representatives, reads as follows:

> The words "and without unnecessary delay" in the third line of section 127 of the Revised Statutes, as amended by the act of March 2, 1887, shall be construed to mean that all officers taking testimony to be used in a contested-election case shall forward the same to the Clerk of the House of Representatives within 30 days of the completion of the taking of said testimony.

Your committee finds that the contestant in this case ignored the plain mandate of the law and the rules of the Committees on Elections of the House and that he has no standing as a contestant before the House of Representatives.

SUMMARY AND CONCLUSION

Your committee therefore finds that the contestant, not having complied with the provisions of the law governing contested-election cases, has no case which can be legally considered by the committee or by the House of Representatives.

For the above reasons your committee recommends the adoption of the following resolutions:

> *Resolved,* That John J. Gorman was not elected a Member of the House of Representatives in the Sixty-eighth Congress from the sixth congressional district of the State of Illinois and is not entitled to a seat herein.
>
> *Resolved,* That James R. Buckley was duly elected a Member of the House of Representatives in the Sixty-eighth Congress from the sixth congressional district of the State of Illinois and is entitled to retain his seat herein.

Privileged resolution (H. Res. 346) was agreed to by voice vote without debate [65 CONG. REC. 10405, 68th Cong. 1st Sess., June 3, 1924; H. Jour. 644].

**§ 4.6 Ansorge v Weller, 21st Congressional District of New York.**

*Ballots* disputed at a complete recount conducted by the parties under state law were examined and recounted by an elections committee upon adoption by the House of a resolution reported from that committee authorizing subpoena of ballots and election officials.

An elections committee, having adopted a resolution establishing categories of disputed ballots, recounted a plurality of valid ballots for contestee.

Report for contestee, who retained his seat.

On Mar. 31, 1924, Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1 reported (H. Rept. No. 409) and called up as privileged the following resolution (H. Res. 242):

*Resolved*, That John Voorhis, Charles E. Heydt, James Kane, and Jacob Livingston, constituting the board of elections of the city of New York, State of New York, their deputies or representatives be, and they are hereby, ordered to appear by one of the members, the deputy or representative, before Elections Committee No. 1 of the House of Representatives forthwith, then and there to testify before said committee, or a subcommittee thereof, in the contested-election case of Martin C. Ansorge, contestant, v. Royal H. Weller, contestee, now pending before said committee for investigation and report; and that said board of elections bring with them all the disputed ballots, marked as exhibits, cast in every election district at the general election held in the twenty-first congressional district of the State of New York on November 7, 1922. That said ballots be brought to be examined and counted by and under the authority of said Committee on Elections in said case, and to that end that the proper subpoena be issued to the Sergeant at Arms of this House, commanding him to summon said board of elections, a member thereof, or its deputy or representative, to appear with such ballots as a witness in said case; and that the expense of said witness or witnesses, and all other expenses under this resolution, shall be paid out of the contingent fund of the House; and that said committee be, and hereby is, empowered to send for all other persons or papers as it may find necessary for the proper determination of said controversy; and also be, and it is, empowered to select a subcommittee to take the evidence and count said ballots or votes and report same to Committee on Elections No. 1, under such regulations as shall be prescribed for that purpose; and that the aforesaid expense be paid on the requisition of the chairman of said committee after the auditing and allowances thereof by said Committee on Elections No. 1.

Reported privileged resolution (H. Res. 242) was agreed to by voice vote without debate [65 CONG. REC. 5271, 68th Cong. 1st Sess., Mar. 31, 1924; H. Jour. 381].

Report of Committee on Elections No. 1 submitted by Mr. R. Clint Cole, of Ohio, on May 14, 1924, follows:

Report No. 756

CONTESTED ELECTION CASE, ANSORGE V WELLER

At the election held in the twenty-first congressional district in the State of New York on November 7, 1922, according to the official returns Royal H. Weller, the contestee, who was the Democratic candidate, received 32,392 votes and Martin C. Ansorge, the contestant, who was the Republican candidate, received 32,047 votes, all other candidates receiving 2,836 votes. Royal H. Weller, the contestee, was declared elected by a plurality of 345 votes over his Republican opponent, Martin C. Ansorge, and a certificate of election was duly issued to him by the secretary of state of New York.

On December 28, 1922, the contestant, in accordance with law, served on the contestee a notice of contest, a copy of which notice and attached petition was in due course filed with the Clerk of the House of Representatives and

in which notice and petition were set forth numerous grounds of contest, which may be summarized as follows:

That the count, canvass, and handling of the ballots in the election districts of the said congressional district were not conducted in the lawful, orderly, and proper manner, provided for by the election law to prevent fraud and unintentional error.

That the contestant prays that the said ballots may be counted under the direction of the House of Representatives by its duly authorized committee and the true result of said election by them ascertained and declared and that if said representations are found to be true and correct, that he has been reelected as a Member of Congress, that the House of Representatives shall so declare, and that he be sworn in as a Member of the Sixty-eighth Congress.

To said notice and petition the contestee, on January 26, 1922, filed his answer setting forth that the notice of the contestant was insufficient in that it contained no facts or proof whatsoever to raise any presumption whatever of mistake, irregularity, or fraud in the original count or canvass, and asking that the application founded thereon be dismissed.

Pursuant to the above notice and petition, the contestant thereupon proceeded, and both parties or their counsel, conducted a recount of all the ballots cast in the twenty-first congressional district of New York at the general election held on November 7, 1922.

The complete and voluminous record and abstract of this recount of 70,525 ballots from the 188 precincts of the twenty-first congressional district of New York were duly filed with the Clerk of the House of Representatives and duly transmitted to this committee; together with the briefs so filed by both parties.

According to the record, during said recount the contestant gained 75 votes in one election district, 60 in another, 33 in another, 22 in another, 17 in another, and lesser net gains in other boxes of separate election districts and upon such recount it was then and is now agreed by counsel for both parties, that upon conceded votes the contestant overcame the contestee's lead or first plurality of 345 and that upon the result of such recount the contestant was ahead of the contestee 115 votes upon the conceded votes, without taking into account the 820 disputed ballots which were subsequently brought before the committee by the Sergeant at Arms under a resolution of this committee adopted by the House of Representatives.

Previous to the sending for the disputed ballots, hearings were given to the parties by your committee on Thursday, March 20, 1924, and Friday, March 21, 1924, at which oral agreements were presented by both the contestant and the contestee and by eminent counsel in their behalf—James R. Sheffield, Esq., and Jacob H. Corn, Esq., appearing for the contestant, and Hon. John W. Davis, John Godfrey Saxe, Esq., and Judge George W. Olvany, appearing for the contestee.

At a subsequent hearing in this case before this committee, held on the 22d day of April, 1924, counsel for contestee offered the following resolution for adoption by the committee:

*Resolved,* That in order to expedite the work of the committee, counsel for the respective candidates be, and they hereby are, instructed, during the next hour to arrange the various ballots which have been brought from New York to Washington into the following piles:

1. Ballots marked otherwise than with a pencil having black lead- this is, ballots marked in ink or with a blue crayon or with an indelible pencil, etc.

2. Ballots bearing a mark for the office of Congressman challenged on the ground that the lines of the alleged cross mark do not cross-i.e., alleged y's, v's, and t's.

3. Ballots bearing a cross mark where the lines cross but challenged because of extra lines forming part of the cross, or because of other irregularities in character or form of the mark.

4. Ballots bearing a cross mark outside of the voting squares.

5. Ballots bearing two cross marks for the office of Congressman, irrespective of whether such marks were made by the voter or claimed to be reprints or impressions.

6. Ballots bearing erasures, smudges, or ink marks.

7. Ballots bearing any name written on the ballot.

8. Ballots challenged because they appear to have been torn by someone.

9. Ballots other than the above which are challenged by either party because of extra lines, dots, and dashes disconnected with the cross mark.

10. All other ballots.

This resolution was agreed to by all parties and adopted by the committee, whereupon the counsel for both parties arranged the ballots into classes, after which the committee heard the argument of counsel on both sides as to the application of the New York statutes and decisions to separate ballots and classes of ballots, and the marking thereof, counsel arranging ballots in 12 classes, 2 additional classes being found advisable by them.

During argument before committee throughout the days of April 23 and April 24, counsel for both parties agreed as to a great number of the ballots of different classes being good for one party or the other, void, or disputed, and as to a great number of the disputed ballots, for the information of the committee, counsel stipulated in the record their respective claim or objection.

The committee having taken jurisdiction of the ease after a hearing on the pleadings and after hearing argument of counsel as to the disputed ballots over a period of 10 days, held executive sessions and gave careful consideration to all issues presented by argument and evidence and by the ballot exhibits. While not considering that the committee was bound by the stipulations and agreements of counsel as to good, void, and protested ballots, the members of the committee have substantially sustained the agreements of counsel and have passed upon the unagreed ballots submitted for the consideration and determination of the committee as well as those included in the

groups agreed by counsel to be good votes for either party or void, as the ease may be. The following tabulation shows the result of the committee's canvass of the entire group of ballots marked as exhibits during the recount held in New York:

| | Good ballots for contestant | Good ballots for contestee |
|---|---|---|
| Class 1 | 17 | 8 |
| Class 2 | 12 | 20 |
| Class 3 | 12 | 7 |
| Class 4 | ..... | 1 |
| Class 5 | 2 | 33 |
| Class 6 | 30 | 43 |
| Class 7 | 2 | 2 |
| Class 8 | ..... | 1 |
| Class 9 | 5 | 15 |
| Class 10 | 29 | 70 |
| Class 11 | 7 | 29 |
| Class 12 | 64 | 69 |
| Envelopes | 7 | 14 |
| Total | 187 | 312 |
| New York recount totals | 31,892 | 31,777 |
| Grand total | 32,079 | 32,089 |

Your committee therefore finds that at the election held in the twenty-first congressional district of the State of New York on November 7, 1922, Royal H. Weller received 32,089 votes and Martin C. Ansorge received 32,079 votes and that Royal H. Weller was elected by a plurality of 10 votes.

Your committee therefore recommends to the House of Representatives the adoption of the following resolutions:

> *Resolved,* That Martin C. Ansorge was not elected a Representative from the twenty-first congressional district of the State of New York and is not entitled to a seat herein.
>
> *Resolved,* That Royal H. Weller was duly elected a Representative from the twenty-first congressional district of the State of New York and is entitled to retain a seat herein.

Privileged resolution (H. Res. 328) agreed to by voice vote without debate [65 CONG. REC. 9631, 68th Cong. 1st Sess., May 27, 1924; H. Jour. 593].

**§ 4.7 Frank v LaGuardia, 20th Congressional District of New York.**

*Evidence* not taken by contestant within the legal time was held grounds for discharge of an elections committee from further consid-

eration of the contest where delay was not excusable and violated the statute, although the parties had stipulated to extensions; House and committee rules were considered mandatory as to the parties.

*Ballots.*—An elections committee refused to order a partial recount where contestant was guilty of laches and did not offer evidence of fraud or irregularities in marking of ballots sufficient to change the election result.

Unethical action by contestee's counsel was not held attributable to contestee.

Report recommending discharge of committee with additional concurring views, contestee retained his seat.

Report of Committee on Elections No. 2 submitted by Mr. John M. Nelson, of Wisconsin, on Jan. 7, 1925, follows:

Report No. 1082

CONTESTED ELECTION CASE, FRANK V LAGUARDIA

FINDING OF FACT

*Official returns.*—At the general election held in the twentieth congressional district of the State of New York on November 7, 1922, according to the official returns Fiorello H. LaGuardia, the contestee, who was the Republican candidate, received 8,492 votes, and Henry Frank, the contestant, who was the Democratic candidate, received 8,324 votes. All the other candidates received 5,358 votes.

*Certificate of election.*—As a result of these returns, Fiorello H. LaGuardia, the contestee, was declared elected by a plurality of 168 over his opponent, Henry Frank, and a certificate of election was duly issued to him by the secretary of the State of New York.

*State proceedings.*—The contestant resorted to proceedings in the courts of his State for an examination of the ballots, which was denied by Mr. Justice MacAvoy, of the supreme court. An appeal from this decision was taken but not prosecuted and the appeal dismissed. In a later action before Mr. Justice Giegerich to pass upon the validity of certain void ballots, the decision of the board of elections declaring some 40 ballots void was sustained by Judge Giegerich and these ballots, therefore, have been declared void both by the board of elections and by decision of the court in the State of New York. While these proceedings were discussed by counsel at the hearing, they furnished no aid to your committee. The findings of the board of elections remain unmodified.

*Notice of contestant.*—On December 28, 1922, the contestant served on the contestee a notice of contest in which were set forth numerous grounds of contest. The allegations in the contestant's notice were of a general nature, not specifieally alleging instances where the election might have been invalidated, but claiming a majority of the legally cast ballots and asking an examination of the ballots and the ballot boxes to ascertain the facts.

*Denial of contestee.*—On January 27, 1923, the contestee answered the contestant's notice of contest, in which he denied all allegations contained therein.

*Time consumed in taking testimony.*—On February 21, 1923, the contestant served on the contestee notice to take testimony, and on February 23, 1923, a preliminary hearing was held before a notary public of the State of New York. On March 1, 1923, the actual taking of testimony was begun by contestant and was adjourned (after the examination of two witnesses) until March 5, 1923, when it was continued, with intermittent adjournments until April 24, 1923, and then adjourned by consent until a date to be later agreed upon.

On July 24, 1923, after a lapse of three months, the hearings were resumed by the contestant, and after one witness was examined adjournment was had until July 30, 1923, and then till August 6, and August 13, 1923, without the examination of any witnesses until the last date. Hearings were conducted with intermittent delays until September 7, 1923 when successive adjournments were had until September 19, 1923, and additional testimony was then taken.

By successive adjournments testimony was taken on several days until November 30, 1923, and on December 21, 1923 a certificate from the notary was offered as evidence that taking of testimony for the contestant had been concluded.

On December 20, 1923, contestee served notice of taking testimony and continued his taking of testimony with intermittent delays until March 1, 1924.

The case was reported by the Clerk to the Speaker on June 3, 1924. The briefs were not served by the contesting parties until after the adjournment of Congress, the first filed on June 30 and the last on August 28, 1924.

*Stipulation of parties.*—On March 1, 1923, parties entered into a stipulation as follows:

> It is stipulated by and between the parties hereto, through their respective attorneys and counsel, that the time limit as fixed by the rules of the House of Representatives and the statutes of the United States governing contested elections shall be deemed as directory and not mandatory, and that either party may have more than the period of time allotted and fixed therein within which to present his respective case in this proceeding, and both sides waive specifically any right to object that they may have under the law with respect to the time so fixed. (Frank *v.* La Guardia, Record, p. 7)

*Application for ballots.*—A few days before the case came on for hearing, counsel for contestant made a request that subpoenas be issued to produce 82 ballots said by him to be in dispute between the parties. To this request the contestee replied that in that event he would ask for the ballots generally to be sent for. It appears that there had been an examination of the ballots by the parties in the case during the taking of the testimony. Attor-

ney for contestee stated at the hearing that he had conceded certain ballots of the contestee to be void under the State law, but which under the ruling in the recent case of Ansorge *v.* Weller before Elections Committee No. 1, were held valid. This presented to the committee the prospects of an extensive recount of the ballots in this congressional district.

*Reasons for denial.*—With the application your committee took into consideration these facts:

The record is bare of any evidence or proof to sustain the general allegations of intimidation, fraud, or of other misconduct alleged in the notice of contest.

Contestant's counsel by failing to stress at all these contentions in the argument conceded that such allegations could not be sustained.

The record fails to reveal any real ground for contest other than the hope that a recount of the ballots might overturn the narrow majority of 168 by which the election of the contestee had been certified by the secretary of state.

The record reveals the fact that the contestant had permitted the contest to drag along up to within a few months of the termination of the Congress to which he claimed election; that the recount, even if successful for the contestant, would still further reduce the value of it for him to the nominal distinction of having been declared elected, but of course he would get the substantial emoluments of salary and clerk hire for two years.

But there is nothing in the record at all persuasive that a recount would change the result. The ballots said to be in dispute involve merely considerations of the kind of lead pencil used by voters, hair lines seen on the face of the ballots, and alleged erasures. There is no question involved of fraud or of other serious irregularities. Moreover, the people in this congressional district at the recent election had reelected contestee over contestant by a large majority.

No cause was found in the record for the laches in taking testimony. At the hearings the attorney for contestant was pressed by members of the committee to give any reason whatever for such utter lack of diligence in the prosecution of the case. Counsel admitted that no reasons could be given other than that parties had amicably agreed by stipulation to waive all objections and that contestant relied on this agreement.

Suggestion was further made by the attorney for the contestant that he relied on the stipulation in view of the feet that contestee's counsel was experienced in election cases and represented the sitting Member.

*The House and committees not boards of recount.*—The committee concluded that even if it were willing to give its time in the closing days of the session to recount these ballots it would not be defensible to take up the time of the House to ask for authority to subpoena State officials to produce the ballots or to give any further consideration of this case. Your committee was strengthened in this conclusion by precedents directly in point. (Galvin *v.* O'Connell, 61st Cong., Moores, p. 39; Kline *v.* Myers, 38th Cong., Hinds, I, 723.) . . .

*Conclusion of law.*—The controlling factors, however, in our minds in reaching the conclusion in this case, were the imperative necessity of safeguarding the printed rules unanimously approved by the three election committees, a special rule of the House recently adopted, the plain and explicit provisions of a law of Congress, and a long and unbroken line of House precedents.

*The rules of committees.*—The rules of the election committees were carefully prepared and unanimously adopted by the three election committees.

They were prepared specifically to expedite the determination of election cases. The contestant's attorney admitted that he had not brought himself within these rules.

*Special House rule.*—A special rule of the House was adopted at the opening of the present Congress, as follows:

> The several elections committees of the House shall make final report to the House in all contested-election cases not later than six months from the first day of the first session of the Congress to which the contestee is elected, except in a contest from the Territory of Alaska, in which case the time shall not exceed nine months. (Sec. 726–a, House Manual.)

The purpose of this rule was clearly stated by the chairman of the Committee on Rules when he presented it to the House for adoption. He said:

> Everyone is opposed to allowing contested election cases to run along until the last day of the session, as is often done, and we can see no good reason for doing so. . . . But with that rule enforced, we thought we could hurry them up and get better action from the election committees than we have had in the past. (Cong. Record, vol. 65, pt. 2, 68th Cong., p. 950.)

*The law.*—The law governing the taking of evidence is as follows:

> Sec. 107. In all contested-election cases the time allowed for taking testimony shall be 90 days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first 40 days, the returned Member during the second 40 days, and the contestant may take testimony in rebuttal only during the remaining 10 days of said period. This shall be construed as requiring all testimony in cases of contested elections to be taken within 90 days from the date on which the answer of the returned Member is served upon the contestant . . .

*House precedents.*—The precedents of the House have recently been very specific and direct in holding that parties guilty of laches would have no standing before the House unless sufficient cause was disclosed for delay. Recent cases directly in point are Gartenstein *v.* Sabath; Parillo *v.* Kunz; and Golombiewski *v.* Rainey, all of the Sixty-seventh Congress.

A stipulation by parties in the nature of an agreement can not waive the plain provision of the statutes. . . .

PROPER PROCEDURE

The proper procedure, if parties require further time has been plainly indicated as follows:

> If either party to a case of contested election should desire further time and Congress should not then be in session, he should give notice to the opposite party of a procedure to take testimony and preserve the same and ask that it be received, and upon good reason being shown, it doubtless would be allowed. (Vallandigham *v.* Campbell, 35th Cong., 1 Hinds, Prec. 726; O'Hara *v.* Kitchin, 1 Ellis 378.)

It is to be noted that Congress was in session from December 3, 1922, to June 7, 1924, but parties did not ask the consent of Congress either to extend the time or to validate the stipulation, even in the face of a special rule of the House that cases must be disposed of within six months after the opening of the Congress.

NOT MANDATORY ON HOUSE

The law providing for the taking of evidence has been held to be not binding upon the House. It has been correctly stated, "That the House possesses all the power of a court having jurisdiction to try to the question who was elected. It is not even limited to the power of a court of law merely, but under the Constitution clearly possesses the functions of a court of equity also." (McKenzie *v.* Brackston, Smith's Election Cases, p. 19; Brooks *v.* Davis, 1 Bart. 44; Horton *v.* Butler, 57th Cong.)

BINDING ON PARTIES

The law, however, is binding upon the parties, as evidenced by the use of the mandatory word "shall." The House alone, upon proper application, may grant a further extension of the time for taking evidence for cause shown as a matter of equity but not of right, or to protect the rights of the people of a district. The binding nature of the law has been well stated as follows:

> Although the acts of Congress in relation to taking evidence in contested election cases are not absolutely binding on the House of Representatives, yet they are to be followed as a rule and not departed from except in extraordinary cases. The contestant must take his testimony under the statute, and in accordance with its provisions, unless he can show that it was impracticable to do so, and that injustice may be done unless the House will order an investigation. (McCrary on Elections. sec. 449.)
>
> They constitute wholesome rules not to be departed from without cause. (Williamson *v.* Sickles, 1 Bart. 288.)
>
> Parties should be held to rigid rule of diligence under it, and no extension ought to be allowed where there is reason to believe that had the applicant brought himself within such rules there

> would have been no occasion for application. (Boles *v.* Edwards, Smith's Contested Election Cases, p. 19.)

In the case of Ansorge *v.* Weller, John W. Davis correctly stated the holding of election committees in the following colloquy:

> Mr. MAJOR. This provision, Mr. Davis, that determines the time when the contestant must take his evidence, do you regard that as a mandatory provision?
>
> Mr. DAVIS. I regard that as mandatory; yes, sir. It has been so held over and over again. Now, there is relief from it. The House, of course, can extend the time upon showing by the contestant, but it has been over and over again held that that being statutory it must be strictly pursued. (Ansorge *v.* Weller, 68th Cong., p. 55. See also Williamson *v.* Sickles, 36th Cong., 1 Hinds Prec., 597–598; Boles *v.* Edwards, 42d Cong., 1 Hinds Prec., 789.)

ON APPLICATION EXTENSION AT TIMES GRANTED

As the House has plenary power, it has frequently granted an extension of time upon application when a worthy cause has been shown and the laches has not been excessive or the failure to follow some requirement of the law has been trivial or technical. (Kline *v.* Verree, 37th Cong.; Boyd *v.* Kelso, 39th Cong.; Delano *v.* Morgan, 40th Cong.; Van Wyck *v.* Greene, 41st Cong.; Bowen *v.* De Large, 42d Cong.; Niblack *v.* Walls, 42d Cong.; Hopkins *v.* Kendall, 54th Cong.; Archer *v.* Allen, 34th Cong.; McCabe *v.* Orth, 46th Cong.; Page *v.* Pirce, 49th Cong.)

HOUSE HAS FREQUENTLY REFUSED EXTENSION

The House has frequently refused to grant extension of time where there was no satisfactory reason assigned or where the laches had been unwarranted. (O'Hara *v.* Kitchin, 46th Cong.; Howard *v.* Cooper, 36th Cong.; Gallegos *v.* Perea, 38th Cong.; Giddings *v.* Clarke, 42d Cong.; Boles *v.* Edwards, 42 Cong.; Thomas *v.* Davis, 43d Cong.; Mabson *v.* Oates, 47th Cong.; Thobe *v.* Carlisle, 50th Cong.; Hoge *v.* Otey, 54th Cong.; Hudson *v.* McAleer, 55th Cong.; Horton *v.* Butler, 57th Cong.)

RIGHTS OF CONTESTEE

While the contestee's attorney joined in the stipulation to waive the requirements of the law, indeed, himself dictated it and was afterwards guilty of a breach of legal ethics when he raised the point of lack of diligence, nevertheless, it is incumbent upon the contestant to prosecute his case speedily. The contestee holds the certificate of election. His title can only be overturned upon satisfactory evidence that he was not elected. His seat in this body can not be jeopardized by the faults of others. It has been held that the House itself must do justice.

> "The House has no right unnecessarily to make the title of a Representative to his seat depend upon the acts, omissions, diligence, or laches of others." (Payne on Elections, sec. 1012.)

RESOLUTION RECOMMENDED

Following the precedent in the case of Reynolds *v.* Butler (see Hinds Prec., vol. 1, sec. 685), in which the duty of contestant to comply with the explicit provisions of the law was discussed, which report was sustained by the House, your committee respectfully recommends the adoption of the following resolution:

> *Resolved,* That the Committee on Elections No. 2 shall be, and is hereby, discharged from further consideration of the contested-election case of Henry Frank *v.* Fiorello H. LaGuardia from the twentieth congressional district of New York.

The following additional concurring news were submitted by Mr. John L. Cable, of Ohio:

It can not be said that contestant's claim was not just, for the committee did not go into the merits of the case. The official count gave contestee a plurality of but 168 over contestant. This number by consent of contestee's counsel has been considerably reduced and it can not now be properly said that if the committee should have gone into the merits of those few remaining contested ballots the contestant would not have received the highest number of lawful votes for the office.

There is no alternative, however, because of the violation and disregard of the rules of this Congress and the laws of the United States, than to adopt the resolution asking that the committee be discharged from further consideration of the case.

Privileged resolution (H. Res. 425) was agreed to by voice vote without debate [66 CONG. REC. 2940, 68th Cong. 2d Sess., Feb. 3, 1925; H. Jour. 191].

## § 5. Sixty-ninth Congress, 1925–27

### § 5.1 Brown v Green, 2d Congressional District of Florida.

*Abatement of contest,* withdrawal of contestant. Report for contestee, who retained seat.

Report of Committee on Elections No. 3 submitted by Mr. Charles L. Gifford, of Massachusetts, on Feb. 24, 1926, follows:

Report No. 359

CONTESTED ELECTION CASE, BROWN V GREEN

The Committee on Elections No. 3, which has had under consideration the contested-election ease of *H. O. Brown* v. *Robert A. Green,* from the second district of Florida, reports as follows:

The contestant having withdrawn from the contest by a letter duly subscribed and sworn to before a notary public, we submit the following resolution for adoption:

> *Resolved,* That Hon. Robert A. Green was duly elected a Representative from the second congressional district of Florida to the Sixty-ninth Congress and is entitled to his seat.

Privileged resolution (H. Res. 170) agreed to by voice vote without debate [67 CONG. REC. 5471, 69th Cong. 1st Sess., Mar. 12, 1926; H. Jour. 371, 372].

**§ 5.2 Sirovich v Perlman, 14th Congressional District of New York.**

*Ballots.*—An elections committee refused to conduct a partial recount of ballots remaining in dispute after a complete recount by the parties, where the parties stipulated that the election result would not be changed.

*Evidence.*—Contestant failed to offer sufficient proof of fraud and conspiracy to defraud by contestee and election officials.

*Evidence.*—Contestant's application for reopening of contest to take further testimony was denied where delay was not justified.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 1 submitted by Mr. Don B. Colton, of Utah, on Apr. 12, 1926, follows:

Report No. 858

CONTESTED ELECTION CASE, SIROVICH V PERLMAN

At the election held in the fourteenth congressional district in the State of New York on November 4, 1924, according to the official returns Nathan D. Perlman, the contestee, who was the Republican candidate, received 12,046 votes and William I. Sirovich, the contestant, who was the Democratic candidate, received 11,920 votes, thereby giving the contestee a plurality of 126 votes.

Mr. Nathan D. Perlman, the contestee, was declared elected by a plurality of 126 votes over his Democratic opponent, William I. Sirovich, and a certificate of election was duly issued to him by the secretary of the State of New York.

On December 30, 1924, the contestant, in accordance with law, served on the contestee a notice of contest, a copy of which notice and attached petition

was in due course filed with the Clerk of the House of Representatives and in which notice and petition were set forth numerous grounds of contest, which may be summarized as follows:

That the State Board of Canvassers of New York and the board of elections of the city of New York, in their canvass and return of the votes cast at said election, had erred in declaring Nathan D. Perlman, the contestee herein, elected, and in issuing to him a certificate of election based upon said canvass and return.

That if contestee did receive an alleged majority of votes it was because of the frauds practiced by said contestee on the electorate on the day of election and prior thereto, and as a result of a conspiracy on the part of contestee to commit a fraud, which was carried out, upon the electorate on the day of election.

That the contestee entered into a conspiracy with one George Rosken and one Abe Lewis to falsify the tally sheets in the twentieth and in the twenty-third election districts.

To said notice and petition the contestee filed his answer setting forth that the notice of the contestant was insufficient in that it contained no statement of facts or proof whatsoever to raise any presumption of irregularity or fraud in the original count or canvass.

The contestee denied each and every allegation of contestant relating to fraud or irregularity.

Pursuant to the above notice and petition and answer the contestant and contestee or their counsel conducted a recount of all the ballots cast for congressional candidates in the fourteenth congressional district of New York at said election. They passed on all of the ballots except 188, which were termed disputed.

These 188 disputed ballots, a copy of the indictment of one George Rosken, the tally sheets and a ring similar to that alleged to have been used by Rosken for marking ballots and other exhibits were subpoenaed from New York and examined by the committee.

Upon permission of the committee, Mr. Stump and Mr. Gilbert, attorneys for the contestant and contestee, respectively, were allowed to pass upon the disputed ballots, and they agreed that 139 were not to be counted; the remainder were disputed.

The committee was not called upon to determine whether these disputed ballots were bona fide votes. It was admitted at the close of the count that contestee had a majority of the votes cast. They were used merely as exhibits in the argument to show fraud and conspiracy.

During the proceedings counsel for contestant made application for the reopening of the case to take further testimony.

Full and complete hearings were had by the committee, after which, in executive session, the committee carefully considered the entire case. The committee found that the contestant had not used due diligence in securing the proper evidence at the time of making his ease in chief and therefore did not feel justified in asking the House for authority to reopen the case.

Your committee therefore finds after a careful analysis of the testimony and argument, and in conformity with a long line of congressional precedents, that the proof presented before the committee by the contestant did not sustain the charges made against the contestee by the contestant.

This is made as a committee report, but Messrs. Hudspeth, Eslick, and Chapman, members of the minority party, declined to vote on the resolutions and also refrained from submitting minority views.

Your committee therefore recommends to the House of Representatives the adoption of the following resolutions:

> *Resolved,* That William I. Sirovich was not elected a Representative from the fourteenth congressional district of the State of New York and is not entitled to a seat herein.
>
> *Resolved,* That Nathan D. Perlman was duly elected a Representative from the fourteenth district of the State of New York and is entitled to retain a seat herein.

Privileged resolution (H. Res. 220) was agreed to by voice vote after debate [67 CONG. REC. 7533, 69th Cong. 1st Sess., Apr. 15, 1926; H. Jour. 507].

**§ 5.3 Clark Edwards, 1st Congressional District of Georgia.**

*Ballots.*—Contestant's allegations of improper arrangement and printing of party designations were not sustained.

*Evidence.*—Contestant failed to offer sufficient proof of fraud and conspiracy to defraud by election officials.

*Pleadings.*—Failure of contestant to file a brief was presumed a withdrawal of the contest.

Expenses of contest were denied to contestant by an elections committee.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 2 submitted by Mr. Bird J. Vincent, of Michigan, on June 10, 1926, follows:

Report No. 1449

CONTESTED ELECTION CASE, CLARK V EDWARDS

STATEMENT OF THE CASE

At the election held in the first congressional district of the State of Georgia on the 4th day of November, 1924, according to the official returns, Charles G. Edwards, the contestee, who was the Democratic candidate, received 14,694 votes; Herbert G. Aarons, the Republican candidate, received 627 votes; and Don H. Clark, the contestant herein, who made the claim that he was the Republican candidate, received 448 votes. As a result of these returns Charles G. Edwards, the contestee, was declared elected, and a certificate of election was duly issued to him by the proper State officials.

The contestant, Don H. Clark, thereafter filed a notice of contest before the House of Representatives in which he charged that he was the duly nominated Republican candidate, but that his name was placed upon ballots in the various counties of the district under such headings as "Independent Party" or "Independent Republican Party."

The committee finds as to this that Herbert G. Aarons was the regularly nominated Republican candidate and that the contestant was not. It seems to the committee that in securing the placing of his name upon the ballots under the party designations used contestant was accorded at least all that he was entitled to.

The contestant charges further that the entire election was illegal, false, and fraudulent because of the existence of a political oligarchy and general conspiracy throughout the district.

As to this the committee finds no testimony worthy of credence to sustain such charge.

The contestant further charges the public officials of the congressional district with skillfully, flagrantly, and criminally violating the provisions of the Neil Act, which is a late election law of Georgia.

The committee finds this charge not to be sustained by the evidence.

The contestant in bombastic and reckless language makes other charges of crime, fraud, deceit, and conspiracy in the district, none of which charges the committee finds to have been supported by evidence.

In an endeavor to support his contest the contestant took testimony throughout the district, which testimony has, with some exceptions, been returned to the House of Representatives and delivered to this committee in the form of a record. Although notified by the Clerk of the House of Representatives in due time as to the requirement of the rules of the House and the law governing contests, as to when he should file his brief, the contestant has not filed any brief up to this time, and has taken no action in the further prosecution of his case since the settlement of the record. As the time has long gone by in which he is permitted to file a brief, the committee assumes that he has abandoned his contest. Whether this be true or not, however, the committee finds that there is absolutely no merit in his contest.

It is proper to state that this same contestant filed a contest in the Sixty-eighth Congress against Hon. R. Lee Moore, who was then the Representative from said district, under almost identical circumstances with the present contest. At that time in the election held November 7, 1922, Mr. Moore received 5,579 votes, P. M. Anderson received 426 votes, and Don H. Clark received 196 votes. Mr. Clark contested Mr. Moore's election. That contest was heard by the Committee on Elections No. 2 of the House of Representatives. There are five members of the Committee on Elections No. 2 in the Sixty-ninth Congress who were members of that committee in the Sixty-eighth Congress, and who heard the contest proceedings of *Clark* v. *Moore*. The following is quoted from the report of the committee at that time:

> The above quotations are typical of the nature of the contestant's brief in this case, and your committee is of the opinion that such loose, extravagant, and unfounded charges being made the basis for an election contest with the consequent expense to the Government should be discouraged in the future.

The Committee on Elections No. 2 in the present case not only finds that the present contest is not grounded in any merit, but also finds that the contestant is not acting with bona fides in bringing it; and it desires to announce to the House of Representatives that, unless otherwise directed by the House, it will decline to authorize the payment by the Government to the contestant in this case of any expense incurred by him in bringing the present contest.

SUMMARY AND CONCLUSION

The committee finds that the contestant has failed to prove his allegations; that there is no evidence warranting the rejection of the votes of any of the precincts of the district; and that the contestee, Charles G. Edwards, was duly and legally elected a Member of the House of Representatives from the first district of Georgia. For the above reasons the committee recommends the adoption of the following resolutions:

> *Resolved,* That Don H. Clark was not elected a Member of the House of Representatives in the Sixty-ninth Congress from the first congressional district of the State of Georgia, and is not entitled to a seat herein.
>
> *Resolved,* That Charles G. Edwards was duly elected a Member of the House of Representatives in the Sixty-ninth Congress from the first congressional district of the State of Georgia, and is entitled to retain his seat herein.

Privileged resolution (H. Res. 296) agreed to by voice vote without debate [67 CONG. REC. 11312, 69th Cong. 1st Sess., June 15, 1926; H. Jour. 778, 779].

**§ 5.4 Bailey v Walters, 20th Congressional District of Pennsylvania.**

*Ballots.*—Partial recounts were (a) initiated and then denied by a local election board for lack of authority under state law, (b) conducted by an official appointed by the parties to take testimony, and (c) then conducted by an elections committee upon adoption by the House of a resolution authorizing subpoena of election officials and disputed ballots.

*Ballots.*—An elections committee refused to order a complete recount where contestant offered insufficient evidence to overcome the presumption of correctness of official returns in undisputed precincts.

Minority views for contestant and sustaining authority of local board to conduct recount.

On May 18, 1926, Mr. Bird J. Vincent, of Michigan, submitted the following resolution as a question of privilege:

*Resolved,* That Logan M. Keller, sheriff of Cambria County, State of Pennsylvania, or his deputy, be, and he is hereby, ordered to appear by himself or his deputy, before Elections Committee No. 2, of the House of Representatives forthwith, then and there to testify before said committee in the contested-election case of Warren Worth Bailey, contestant, against Anderson H. Walters, contestee, now pending before said committee for investigation and report and that said sheriff or his deputy bring with him all the ballots cast in the sixteenth ward of the city of Johnstown, Pa., and in Westmont Borough No. 2, of Cambria County, Pa., at the general election held in the twentieth congressional district of the State of Pennsylvania on November 4, 1924. That said ballots be brought to be examined and counted by and under the authority of said Committee on Elections in said case, and to that end that the proper subpoena be issued to the Sergeant at Arms of this House, commanding him to summon said sheriff, or his deputy, to appear with such ballots as a witness in said case, and that the expense of said witness, and all other expenses under this resolution, shall be paid out of the contingent fund of the House; and that the aforesaid expense be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by said Committee on Elections No. 2.

When said resolution was considered and agreed to.

Privileged resolution (H. Res. 270) was agreed to by voice vote without debate [67 CONG. REC. 9646, 69th Cong. 1st Sess., May 18, 1926; H. Jour. 670, 671].

Report of Committee on Elections No. 2 submitted by Mr. Bird J. Vincent, of Michigan, on June 10, 1926, follows:

Report No. 1450

CONTESTED ELECTION CASE, BAILEY V WALTERS

STATEMENT OF THE CASE

At the general election held in the twentieth congressional district of the State of Pennsylvania on November 4, 1924, which district is composed of the single county of Cambria in said State, the contestee, who was the candidate for Representative in Congress of the Republican, the Progressive, and the Prohibition Parties, according to the official returns received 23,519 votes; and Warren Worth Bailey, the contestant, who was the candidate of the Democratic, Socialist, and Labor Parties, according to the official returns, received 23,456 votes. Thus according to the official returns the contestee had a clear majority of 63 votes, and it was upon this majority so found that the certificate of election was issued to the contestee and he was seated in the House of Representatives.

In view of proceedings which were taken immediately after the election it is proper at this point to state that the act of Assembly of the Commonwealth of Pennsylvania approved May 19, 1923, provides as follows:

> And in case the returns of any election district shall be missing when the returns are presented, or in case of complaint of a qualified elector, under oath, charging palpable fraud or mistake, and particularly specifying the alleged fraud or mistake, or where fraud or mistake is apparent on the return, the court shall examine the return; and if in the judgment of the court it shall be necessary to a just return, said court shall issue summary process against the election officers and overseers, if any, of the election district complained of, to bring them forthwith into court, with all election papers in their possession; and if palpable mistake or fraud shall be discovered, it shall, upon such hearing as may be deemed necessary to enlighten the court, be corrected by the court and so certified; but all allegations of palpable fraud or mistake shall be decided by the said court within three days after the day the returns are brought into court for computation; and the said inquiry shall be directed only to palpable fraud or mistake and shall not be deemed a judicial adjudication to conclude any contest now or hereafter to be provided by law; and the other of said triplicate returns shall be placed in the box and sealed up with the ballots.

. . . The board proceeded to examine witnesses and to recount ballots in these precincts, and through its clerks had the results of such recounts taken down but had not yet reached the point where the results of such recounts had become the official act of said board when the contestee, Mr. Walters, through his counsel, presented a petition that the returns of the various precincts should be canvassed in accordance with their face and the certificate of election should be determined to be issuable to him because of his majority of 63 votes on the face of the original returns, which petition was based upon the contention that in the case of a candidate for Representative in Congress the Constitution reposes in the House of Representatives the determination of the qualifications, elections and returns of its own members, and that therefore this board did not have the authority to go back of the original returns and recount boxes. At the time this petition was presented it appears that so far as such recount had then gone Mr. Bailey, the contestant, would have had at that time, as the count then stood, a majority of 14 votes. But, as said above, the recount in these precincts, as made by the board, never became an official act.

The two judges who constituted the computation board granted a hearing on the petition of the contestee, Mr. Walters, and were unable to agree, one holding that Mr. Walters was correct in his contention and the other holding the opposite. Thereupon, under the provision of the law of Pennsylvania, Hon. Thomas J. Baldrige, president judge of the court of common pleas of Blair County, Pa. (outside this congressional district), was assigned to sit with the two judges above named, and upon further hearing before the three

judges he held with the contention raised by Mr. Walters, and it was decided that the computation board was without authority to go beyond the face of the original returns in the various election precincts, and, therefore, it was held that the contestee, Mr. Walters, was entitled to receive the certificate of election. In this decision written by Judge Baldrige, Judge Evans concurred and Judge McCann dissented.

Thereupon Mr. Bailey, the contestant, through his counsel, appealed from this order to the Supreme Court of Pennsylvania and the matter was argued before that court with six judges sitting. The opinion of that court in full is as follows:

> The judges who heard this case are equally divided in opinion on the question as to whether or not the votes in the ballot box of St. Michael district could legally be counted by the computing board. When these ballots are counted Bailey is entitled to the certificate of election, but when not, Walters is entitled to receive it. The court being divided on the question of the legal right to count the votes considered, it follows that the order appealed from must stand and the certificate issued to Anderson H. Walters. It is so ordered.

A petition for reargument was denied. Later Mr. Bailey, the contestant, through his counsel, applied for a writ of certiorari to the Supreme Court of the United States, but this also was denied. A certificate of election, in accordance with the holding of the Supreme Court of Pennsylvania, was issued to Mr. Walters, the contestee.

Thereupon Mr. Bailey, the contestant, filed his notice of contest before the House of Representatives on the general ground that the certificate of election should have been issued to him, that he had actually received more votes in the district than his opponent, that in certain specified precincts of the district either by mistake or fraud he had not received credit for all of the votes actually east for him, and that his opponent had received credit through fraud or mistake for more votes in various specified precincts than were cast for him.

To this notice of contest, the contestee duly made his answer denying most of the allegations of the contestant, and averring on his own behalf that through fraud or mistake more votes had been credited to the contestant, Mr. Bailey, in various precincts than were actually cast for him, and that through fraud or mistake contestee had failed to receive credit for many votes which were cast for him. He also alleged that many unnaturalized aliens had voted in the election for the contestant, Mr. Bailey, and, also, many persons had so voted who had not the right of franchise because they were not duly registered voters in the precincts where they voted.

After filing the necessary documents in the congressional contest the parties in the contest proceeded in their turn to take testimony before commissioners with respect to alleged mistakes, frauds, and irregularities in a number of specified precincts, and conducted before such commissioners recounts of the ballots in a number of the ballot boxes. As a result of such testimony and recounts it is conceded that the recounts made showed . . . gains for

the contestee, Mr. Walters, of 36 votes. Three other precincts, recounted, resulted in no change.

It is proper to say at this point that as a part of his proceedings in the congressional contest Mr. Bailey, the contestant, petitioned the committee for a recount of all the votes in all the precincts of the congressional district.

Outside of the conceded changes as set forth above there was presented to the Committee on Elections No. 2 disputed questions of law and fact involving the following:

1. The question of a general recount of all the ballots in the congressional district.

2. The question of 16 votes claimed by Mr. Bailey, the contestee, in the sixteenth ward of Johnstown city.

3. The question of 40 votes claimed by Mr. Bailey, the contestee, in St. Michaels district.

4. The question of a number of votes claimed by Mr. Walters, the contestee, in Westmont Borough, No. 2, which were claimed to have been changed by marking after they had left the hands of the voter.

5. The question of votes claimed by Mr. Walters to have been cast to his injury by unnaturalized aliens.

6. The question of unregistered voters claimed by Mr. Walters to have been allowed to vote at said election, to his injury.

CONCLUSIONS OF THE COMMITTEE

1. As to the petition for a general recount. It seems to be in accordance with a long line of precedents in Congress that in order to secure a recount, before an elections committee, that tangible evidence must first be produced tending to show that such recount will probably change the result of the original returns from such ballot boxes; and that in the absence of such tangible evidence or testimony recounts will be refused. It will be noted that in the case of 19 precincts where tangible evidence was produced that recounts were had before the commissioners, and later on in this report it will appear that in the matter of 2 other precincts, Westmont Borough, No. 2, and the 16th Ward of Johnstown City, where tangible testimony was taken and presented to this committee, that recounts were had before the committee itself. But no testimony nor proof casting suspicion upon any ballot boxes in the district, nor the returns from them, was produced except as to the 21 ballot boxes which have been recounted. In the election contest of Ansorge *v.* Weller, in the Sixty-eighth Congress, Hon. John W. Davis, who appeared as counsel for one of the parties. stated his conclusion as to the law on this subject in the following words, which this committee thinks is a correct statement of the law as shown by the precedents of Congress:

> It has been said again and again by the House, by the court, by every tribunal that has this duty of passing upon a contested election that the returns which are made by the inspectors, regularly appointed by the laws of the State where the election is held, are presumed to be correct until they are impeached by

> proof of irregularity and fraud, and that the House will not erect itself, nor will it erect its committees as mere boards of recount. It is conceived that when the statutes of the State have set up these bipartisan boards and made due and proper provision for their selection, that it is, as a matter of public policy, wise and right that their conclusions shall be accepted by the parties to the election, by the public, and by any board charged with the duty of passing on the result, until such time as such irregularities and frauds are proved as to raise a fair presumption that their duties were not honestly performed.

The committee, therefore, has concluded that there is no just cause shown for a general recount of the votes in the district outside of the 21 precincts around which testimony has centered.

2. The matter of the sixteenth ward of Johnstown city. With respect to the ballot boxes and votes in this ward, it should be said that a petition was filed before the proper court to impound the ballots from certain precincts, including this one, which petition was granted by the court, and it appears from the testimony in the record in this case that when the ballots were being transferred from the ballot boxes to the package for the purpose of impounding that the ballots were handled separately, and the witness who was present testified that he made account in this informal way which showed a net gain for Mr. Bailey, the contestant, of 16 votes over the original face of the returns. In this precinct the original returns were as follows: Walters 19, Bailey 535.

The committee ordered a recount of the votes in this precinct and secured an order of the House of Representatives to have the ballots brought before it and did recount the votes, and found the contestant's position was sustained, the recount showing the following result: Walters 20, Bailey 552, or a net gain of 16 for the contestant.

The following minority views were submitted by Mr. Gordon Browning, of Tennessee; Mr. T. Webber Wilson, of Mississippi; and Mr. John J. Douglass, of Massachusetts:

The minority members of the committee have not made a separate report in this case for the reason that they feel the report is correct in its effect under the present state of the record, though we believe the result would be different if the committee could have justified itself in a recount of all the votes of the district.

The precedents of the House seem to hold that some evidence of fraud or mistake should be produced as to each box to be opened before such action is taken. This was not done. And in this case sufficient proof was lacking to show the boxes were kept intact and in the proper custody for several months intervening between the election and the impounding of the ballots.

The latter condition is due largely no doubt to the loose provisions of the election laws in the State of Pennsylvania as to the disposition and custody of the ballot boxes after elections. There seems to be no arrangement for their security and the provisions applying to same are merely directory.

Of the comparatively few boxes recounted the contestant showed a consistent gain. This no doubt was due largely to the newness of the provisions in their election laws in Pennsylvania governing the counting of split ballots. Most of the split ballots in the district were cast for Mr. Bailey and as a result he ran far ahead of all his tickets. We believe from the record and the result that in many instances those holding the election were in error as to his right to receive these split ballots where he was voted for on otherwise Republican ballots.

There is another phase of the contest the minority members of the committee feel should be passed upon by the committee, since it involves a vital principle of Constitutional rights. There is a provision in section 17 of the acts of Assembly of the Commonwealth of Pennsylvania, approved May 19, 1923, P.L. 267, as follows:

> (1) And in case the returns on any election district shall be missing when the returns are presented, or in case of complaint of a qualified elector, under oath, charging palpable fraud or mistake, and particularly specifying the alleged fraud or mistake, or where fraud or mistake is apparent on the return, the court shall examine the return, and, if in the judgment of the court it shall be necessary to a just return, said court shall issue summary process against the election officers, and overseers, if any, of the election district complained of, to bring them forthwith into court, with all election papers in their possession; and if palpable mistake or fraud shall be discovered, it shall, upon such hearings as may be deemed necessary to enlighten the court, be corrected by the court, and so certified; but all allegations of palpable fraud or mistake shall be decided by the said court within three days after the day the returns are brought into the court for computation; and the said inquiry shall be directed only to palpable fraud or mistake, and shall not be deemed a judicial adjudication to conclude any contest now or hereafter to be provided by law; and the other of said triplicate returns shall be placed in the box and sealed up with the ballots.

Pursuant to this provision both parties to this contest had the ballots in some of the boxes recounted, with the result that instead of Walters having a majority of 63 Bailey was shown to have a majority of 14, and under the count of the computing board was clearly entitled to the certificate of election. Before this result was announced and certificate issued to Bailey the contestee filed his petition with the court, which court was also the computing board, averring that the recount was beyond the jurisdiction of the computation court and that said court had no supervisory power to examine what preceded the election returns in so far as the election of a Representative in Congress was concerned. A rule was granted on this petition and later made absolute.

The effect of this holding was to say that no State has a right to go back of the returns in the election of a Federal officer, regardless of the provisions of the laws of that State. We insist such a holding is wrong and should be

repudiated by the House. Otherwise the burden of contest can easily be unjustly thrown upon a candidate who should not bear it, as in our opinion was done in this case.

Unquestionably the Federal Government has the right to regulate Federal elections if it sees fit to do so. However, it is not the mere existence of a power in the Federal Government but the exercise of that power which is incompatible with the exercise of the same power by the States.

It has been repeatedly held by the House of Representatives that statutes by States conferring power on computing boards to go behind the returns are constitutional. (Giddings *v.* Clark, 42d Cong.; Norris *v.* Hadley, 42d Cong.; Smith *v.* Jackson, Rowell, 9; also see McCray, art. 266.) Several State supreme courts have sustained this position. In Norris *v.* Hadley the Alabama statutes empowered a "board of supervisors of elections" to hear proof upon charges of fraud, etc., and upon sufficient evidence to reject unlawful and fraudulent votes cast. The committee said:

> It is believed by the committee that the action of such a board under the statute in question, and in pursuance of the power conferred thereby, is to be regarded as prima facie correct, and to be allowed to stand as valid until shown by evidence to be illegal or unjust.

In 1870 the first statute embodying a comprehensive system for dealing with congressional elections was enacted by Congress. After 24 years of experience practically every law relating to this subject was repealed and Congress returned to its former attitude of entrusting the conduct of all elections to the State laws, administered by State officials. This matter was covered fully in the opinion by Mr. Justice Clarke in United States *v.* Gradwell (243 U.S. 481–5, October term, 1916).

The opinion of the Supreme Court of Pennsylvania set out in full in the report in this case, although indicating this position, yet does not pass on what we think is a vital matter of principle and one fundamental to the rights of States to regulate elections.

*Ballot boxes.*—Election officials' noncompliance with state law regulating custody after election was held not to void a recount of enclosed ballots where law was held directory and where extrinsic evidence overcame a presumption of tampering.

*Ballots,* fraudulently marked by someone other than the voters, were examined and recounted by an elections committee.

The majority report continued:

3. The matter of St. Michaels district in Adams Township. As briefly as may be told the situation in this district was as follows: The law required the election officials at the conclusion of their work on election night to take the ballot box, after it had been closed and sealed in accordance with law, to the nearest justice of the peace to remain in his custody. The election was held in a schoolhouse and after the conclusion of the work of the election officials, they placed the ballot box in a room in the schoolhouse on a pile

of old desks and left it in custody of no one. When the returns were published the next day all of the election officials in this precinct except one agreed that there was a mistake in the announced vote of Representative in Congress and petitioned the computation board for a correction of the error. They claimed that 40 votes which should have been included for Mr. Bailey in the tabulation, which were cast for him on the Labor and Socialist tickets must have been omitted. Two or three days after the election the judge of elections became alarmed at the talk which was going around concerning this vote, and he and his wife in the evening drove down to the schoolhouse and went in and got the box and took it to the nearest justice of the peace. When the computation board ordered the sheriff to bring in the box, he found it in the home of this justice and also found that the cover had a crease or dint in it, so that there was an opening between the cover and the top edge of the box into which one might slip the fingers of his hand. When the box was brought before the board the tape was found to be broken and the seals broken. However, the 40 votes claimed for Mr. Bailey were found to be in the box, the unused ballots still attached to the stubs were in the bottom of the box, and by checking it appeared that all of the ballots then in the box could be accounted for. All of these facts were made to appear by testimony before the commissioner in the congressional contest and were returned to the House of Representatives in the record in this case. It is conceded that the box was not kept in proper custody according to law. It is conceded too that its condition laid it open to suspicion. There is testimony, however, that the condition of the cover of the box had been the same for several prior elections and that the election precinct officials had requested a new box of the proper authorities which had not been furnished. After most carefully reviewing all of the testimony in the case and in view of the fact that the law of Pennsylvania with regard to the custody of the box is held to be directory and not mandatory, and that the testimony seems to account properly for the existence of all of the ballots, the committee finds as a matter of fact that these ballots were cast for Mr. Bailey, the contestant, as claimed by him, and awards him a net gain in that precinct of 40 votes, the original count being, Walters 104, Bailey 63; the recount being, Walters 102, Bailey 101.

4. The matter of Westmont Borough, No. 2. When this box was brought before the computation board the two judges noticed that some of the ballots were marked for Mr. Bailey by a peculiarly shaped cross differing from the other crosses made by the voter on the same ballot, and the judges called each other's attention to it, but no attempt was made to correct the error or fraud nor to determine the extent of it at that time. It is conceded in the record, and it was conceded in the argument before the committee, that the ballots in this box were counted in accordance with the markings upon them, including these peculiarly shaped crosses. When the congressional contest was being held and testimony being taken before a commissioner, the ballots from this box were examined carefully by a handwriting expert, who found some 50 ballots which he testified had marks upon them opposite the name of Mr. Bailey consisting of peculiarly shaped crosses made by one stroke of the pencil, and that all of these peculiar crosses were made by the

same person and not by the person who made the other crosses on each of the ballots involved. In a number of instances among these 50 ballots it was testified that a cross had been made opposite Mr. Walters's name and erased and a cross placed opposite Mr. Bailey's name in those instances of this peculiar character. The attorneys admitted before the committee upon the hearing that in each of these instances the ballot had been credited to Mr. Bailey. Hence, if these peculiar crosses were placed on the ballot by someone other than the voter, Mr. Walters had suffered thereby to that extent in the count of the votes in this box. The committee was unwilling to act in this matter without the benefit of a personal inspection of these ballots and secured by resolution of the House the right to have all the ballots of Westmont Borough, No. 2, brought before the committee. Personal inspection of these ballots by the members of the committee has convinced the committee beyond doubt that these peculiarly shaped crosses were not made by the same person who voted the ballots. In the instance of one of the ballots the voter marked his crosses upon the ballot with blue pencil and the peculiarly shaped cross appears on that ballot, as on the others, in black pencil. Having become convinced that the allegations concerning the peculiar cross were true, the committee proceeded itself to recount the ballots cast in this precinct, with the following results: On the original count, the vote stood—Walters 208, Bailey 208; on the recount by the committee the vote stands—Walters 246, Bailey 170, or a net gain for the contestee, Mr. Walters, of 76 votes.

*Suffrage.*—Ballots cast by women who lost their citizenship for marrying aliens prior to passage of the "Cable Act" were held void, based on a Supreme Court decision.

*Returns.*—Were partially rejected by proportional deduction method where it was not determinable for whom void ballots were cast.

*Ballots.*—Allegedly cast by unregistered voters were not voided, as the election result would not be affected and as evidence was inconclusive.

Majority report for contestee, who retained his seat.

5. The question of unnaturalized voters. The contestee, Mr. Walters, through his counsel, introduced testimony proving that a number of persons voted in the election who were not citizens. Many of these women who had married aliens prior to the passage of the Cable Act September 22, 1922, and who had not taken out naturalization papers to regain their citizenship. Other instances were shown of aliens voting who had never been citizens of the United States. A few of these persons when questioned before the commissioner testified as to the candidate for whom they voted for Representative in Congress, and a larger number stood upon their constitutional right and refused to answer the question respecting the candidate for whom they voted. In his presentation of the contestee's case before the committee the counsel for the contestee subtracted from the vote of Mr. Walters all such aliens who testified to having voted for him, and subtracted from the vote of Mr. Bailey the votes of all such persons who testified to having voted for

him. As to those aliens who voted and refused to state for whom they voted, the subtraction was made by reducing the vote of each candidate in the precincts where the illegal votes were shown to be cast in accordance with the pro rata share of the total vote obtained by each candidate in that particular precinct. It was conceded upon the hearing by the attorneys for the contestant that this was the proper method in accordance with the precedents of Congress for purging the returns from these precincts of these illegal votes, and the committee also finds upon examination that this method is the correct one. The only question raised upon the hearing by the contestant through his counsel was this: He claimed that an American-born woman who married a foreigner prior to the passage of the Cable Act but who continued to reside in this country did not lose her citizenship. He conceded that if it were found that the Supreme Court of the United States had held that she did lose her citizenship by such marriage that then the entire claim of the counsel of Mr. Walters, the contestee, and his method of purging the returns from these votes were correct. As a matter of fact the Supreme Court of the United States has so held. (MacKenzie *v.* Hare, 239 U.S. 299.)

Under the facts shown in the record and under the concessions made at the hearing the net gain to the contestee, Mr. Walters, because of these illegal votes by aliens is 21 votes, which the committee awards to Mr. Walters, the contestee.

The question of unregistered voters: Proof was submitted by the contestee that 586 illegal votes were cast in the election because the voters who cast them were not registered in accordance with law and, therefore, had not the right of franchise under the mandatory laws of the State of Pennsylvania. If the proof of this allegation were held by the committee to be sufficiently made and the election purged of these votes in accordance with the rule thereupon fixed by the precedents in Congress, it would serve to increase the contestee's majority over the contestant by 262 additional votes. However, there is a division of opinion in the committee as to whether the method of proof is proper and sufficient, and since the determination of this question is not necessary to the decision in this case (contestee already having a majority of the votes) the committee refrains from expressing an opinion in connection with this matter.

SUMMARY

Bringing the conceded gains of each party, as shown by the recounts before the commissioners, and the several findings which the committee has made, into tabular form, we have the following:

| | |
|---|---|
| Majority for contestee on official returns | 63 |
| His conceded net gains in recounts before commissioners | 36 |
| His net gain in Westmont Borough No. 2 | 76 |
| His net gain by purging returns of votes cast by unnaturalized aliens | 21 |
| | 196 |

| | |
|---|---|
| Contestant's conceded net gains in recounts before commissioners | 89 |
| His net gain in sixteenth ward of Johnstown city | 16 |
| His net gain in St. Michaels district | 40 |
| | 145 |
| Contestee's majority as determined by committee | 51 |

Therefore, the committee finds that the contestee received a majority of 51 of the legal votes cast for Representative in Congress at said election, and was duly and legally elected a Member of the House of Representatives from the twentieth district of the State of Pennsylvania. For the above reasons the committee recommends the adoption of the following resolutions:

> *Resolved,* That Warren Worth Bailey was not elected a Member of the House of Representatives in the Sixty-ninth Congress from the twentieth congressional district of the State of Pennsylvania and is not entitled to a seat herein.
>
> *Resolved,* That Anderson H. Walters was duly elected a Member of the House of Representatives in the Sixty-ninth Congress from the twentieth congressional district of the State of Pennsylvania and is entitled to retain his seat herein.

Privileged resolution (H. Res. 295) agreed to by voice vote after debate [67 CONG. REC. 11307–12, 69th Cong. 1st Sess., June 15, 1926; H. Jour. 778].

## § 6. Seventieth Congress, 1927–29

### § 6.1 Wefald v Selvig, 9th Congressional District of Minnesota.

Committee on Elections No. 2

*Abatement of contest* since contestant neglected to take testimony within the legal time.

No committee report, and no House disposition.

On Dec. 14, 1927, the Speaker laid before the House the following communication from the Clerk of the House:

SIR: I have the honor to inform the House that in the ninth congressional district of the State of Minnesota, at the election held on November 2, 1926, C. G. Selvig was certified as having been duly elected as a Representative in the Seventieth Congress, and his certificate of election in due form of law was filed in this office. His right to the seat was questioned by another candidate, Knud Wefald, who served notice on the returned Member of his purpose to contest the election. A copy of this notice, together with the reply of contestee, were filed in the office of the Clerk of the House, who also re-

ceived the affidavit of contestee and of his counsel to the effect that no notice of taking depositions or of the introduction of proof of any kind was served upon contestee or upon his attorneys, and that more than 40 days elapsed from the date of service of contestee's answer. No testimony has been filed with the Clerk. The contest, therefore, appears to have abated.

House Document No. 117 [69 CONG. REC. 664, 70th Cong. 1st Sess.].

**§ 6.2 Clark v White, 6th Congressional District of Kansas.**

*Notice of contest* not served within the legal time was held grounds for dismissal of the contest.

*Abatement of contest* by withdrawal of contestant.

*Expenses of contest.*—An elections committee exercised its discretion in awarding expenses to contestant.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 1 submitted by Mr. Don B. Colton, of Utah, on Feb. 21, 1928, follows:

Report No. 717

CONTESTED ELECTION CASE, CLARK V WHITE

At the election held in the sixth congressional district in the State of Kansas on November 5 and 8, 1926, according to the official returns, Hays B. White, the contestee, who was the Republican candidate, received 31,159 votes, and W. H. Clark, the contestant, who was the Democratic candidate, received 31,065 votes, thereby giving the contestee a plurality of 94 votes.

Mr. Hays B. White, the contestee, was declared elected by a plurality of 94 votes over his Democratic opponent, W. H. Clark, and a certificate of election was filed with the Clerk of the House of Representatives.

Thereafter the contestant served on the contestee a notice of contest, a copy of which notice and attached petition was in due course filed with the Clerk of the House of Representatives.

To said notice and petition the contestee filed his answer setting forth that "by his [aches, delay, and failure to comply with the statute promulgated in this behalf by the Congress, or to serve on the contestee any notice of intention to contest prior to December 11, 1926, the contestant is precluded from asserting or proceeding with said contest, and that said contest be dismissed."

Thereafter nothing was done except that the attorneys for the parties appeared before your committee and made brief statements and requested that the contest be dismissed.

Your committee therefore finds, after a careful analysis of this case and in conformity with congressional precedents, that this contested-election case should be dismissed and recommends to the House of Representatives the adoption of the following resolutions:

> *Resolved,* That W. H. Clark was not elected a Representative in this Congress from the sixth congressional district of the State of Kansas and is not entitled to a seat herein.
>
> *Resolved,* That Hays B. White was duly elected a Representative from the sixth congressional district of the State of Kansas and is entitled to retain his seat herein.

Privileged resolution (H. Res. 122) was agreed to by voice vote after debate on issue of expenses of contest-contestant awarded one-half of amount claimed due him [H. Jour. 455, 70th Cong. 1st Sess.].

**§ 6.3 Hubbard LaGuardia, 20th Congressional District of New York.**

*Abatement of contest* by withdrawal of contestant.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 1 submitted by Mr. Don B. Colton, of Utah, on Feb. 28, 1928, follows:

Report No. 787

CONTESTED ELECTION CASE, HUBBARD V LAGUARDIA

The Committee on Elections No. 1, which has had under consideration the contested election case of H. Warren Hubbard *v.* Fiorello H. LaGuardia, from the twentieth district of New York, reports as follows:

The contestant having withdrawn from the contest by a letter of abatement duly subscribed and sworn to before a notary public, we submit the following resolution for adoption:

> *Resolved,* That Hon. Fiorello H. LaGuardia was duly elected a Representative from the twentieth congressional district of the State of New York to the Seventieth Congress and is entitled to his seat.

Privileged resolution (H. Res. 128) agreed to by voice vote without debate [69 CONG. REC. 3862, 70th Cong. 1st Sess., Mar. 1, 1928; H. Jour. 490].

**§ 6.4 Investigation of the Inhabitancy Qualification of James M. Beck, 1st Congressional District of Pennsylvania.**

*Qualifications of Member.*—Investigation of a Member's inhabitancy qualification was instituted by a privileged resolution referring to an elections committee the question of the final right of the Member to his seat.

A resolution referring the questions of prima facie and final rights of a Member-elect to his seat was amended to permit the Member-elect to be sworn.

On Dec. 5, 1927, during the organization of the House of Representatives of the Seventieth Congress, Mr. Finis J. Garrett, of Tennessee, objected to the administration of the oath to James M. Beck, of Pennsylvania. Mr. Garrett then offered the following resolution (H. Res. 1) as privileged:

Whereas it is charged that James M. Beck, a Representative elect to the Seventieth Congress from the State of Pennsylvania, is ineligible to a seat in the House of Representatives for the reason that he was not at the time of his election an inhabitant of the State of Pennsylvania in the sense of the provision of the Constitution of the United States (par. 5 of sec. 2, Art. I) prescribing the qualifications for Members thereof; and whereas such charge is made through a Member of the House and on his responsibility as such Member, upon the basis, as he asserts, of records and papers evidencing such ineligibility:

*Resolved,* That the question of the prima facie right of James M. Beck to be sworn in as a Representative from the State of Pennsylvania of the Seventieth Congress, as well as of his final right to a seat therein as such Representative, be referred to Committee on Elections No. 2; and until such committee shall report upon and the House decide such question and right, the said James M. Beck shall not be sworn in nor be entitled to the privileges of the floor; and said committee shall have power to send for persons and papers and examine witnesses on oath relative to the subject matter of this resolution.

After debate Mr. Garrett moved the previous question on the resolution which was refused (158 yeas to 244 nays). Thereupon, Mr. Bertrand H. Snell, of New York, offered the following substitute, which was agreed to by voice vote:

*Resolved,* That the gentleman from Pennsylvania, Mr. Beck, be now permitted to take the oath of office.

The resolution, as amended, was agreed to by voice vote, whereupon Mr. Beck appeared at the bar of the House and was administered the oath of office. [69 CONG. REC. 8, 10, 70th Cong. 1st Sess., Dec. 5, 1927, H. Jour. 7.]

When the organization of the House was completed, Mr. Garrett offered the following privileged resolution:

Whereas it is charged that James M. Beck, a Representative elect to the Seventieth Congress from the State of Pennsylvania, is ineligible to a seat in the House of Representatives for the reason that he was not at the time of his election an inhabitant of the State of Pennsylvania in the sense of the provision of the Constitution of the United States (par. 5 of sec. 2, Art. I) prescribing the qualifications for Members thereof; and

Whereas such charge is made through a Member of the House, and on his responsibility as such Member upon the basis, as he asserts, of records and paper evidencing such ineligibility:

*Resolved,* That the right of James M. Beck to a seat in the House of Representatives of the Seventieth Congress be referred to the Committee on Elections No. 2, which committee shall have power to send for persons and papers and examine witnesses on oath relative to the subject matter of the resolution.

Privileged resolution (H. Res. 9) agreed to by voice vote without debate [69 CONG. REC. 13, 70th Cong. 1st Sess., Dec. 5, 1927; H. Jour. 8].

*Qualifications of Member.*—The constitutional requirement of inhabitancy in the state when elected was held satisfied where the Member belonged to the "body politic" and lived in a leased apartment in that state part of each week, though he owned residences in other jurisdictions.

Majority report for seated Member, who retained seat.

Minority views that inhabitancy requirement was not met and that the Member was not entitled to his seat.

Report of Committee on Elections No. 2 submitted by Mr. Bird J. Vincent, of Michigan, on Mar. 17, 1928, follows:

Report No. 975

INVESTIGATION OF THE INHABITANCY QUALIFICATION OF JAMES M. BECK

[To Accompany the James M. Beck Election Case]

It will be seen at once that the sole question involved is the naked constitutional question as to whether, under the facts, Mr. James M. Beck at the time of his election to the House of Representatives was an inhabitant of Pennsylvania within the meaning of paragraph 2 of section 2, Article I of the Constitution of the United States. This and no other question is involved. No charge of fraud, nor any other wrongdoing, is raised against the entire regularity and legality of Mr. Beck's nomination nor election except the one question of his inhabitancy of Pennsylvania.

THE FACTS

Mr. James M. Beck was born in Philadelphia, Pa., July 9, 1861. He was educated in the schools of that city. Later he attended the Moravian College at Bethlehem, Pa. He was admitted to the bar in Philadelphia in 1884, and resided in that city and practiced law there continuously until 1900. During this period he served one term as assistant United States attorney for the district in which Philadelphia is located, and also one term as United States attorney for the same district. In 1900, he was appointed by President McKinley Assistant Attorney General of the United States, and came to Washington to discharge the duties of that office, but retained his residence

in Philadelphia until 1903, when he resigned from this office. Upon his resignation he went to the city of New York to engage there in the practice of law. At that time he gave up his residence in Philadelphia and acquired a residence in New York City. He continued to reside in New York City until November, 1920. In the intervening period between 1903 and 1920, he acquired a summer home, not suitable for residence except as a summer place, at Seabright, N.J., which property he still owns.

In November, 1920, he sold his residence in New York City and came to Washington and purchased a house which he has owned since, at 1624 Twenty-first Street NW. He purchased this home in Washington in anticipation of being appointed to a position in the Harding administration, and in 1921 he was appointed Solicitor General of the United States by President Harding. He held this position until 1925, when he resigned for the reason that his eyesight was being impaired by the burden of the work connected with that office.

Mr. Beck testified that when he went to New York to practice law, in 1903, he did so for the purpose of acquiring a competence; that he never intended to make New York his permanent home; that it was always his intention to return to his native city of Philadelphia when such a competence had been acquired. And that when he sold his residence in New York in 1920 he ceased all residential connection with that city and State.

On April 30, 1925, he was appointed by the mayor of Philadelphia to represent the city of Philadelphia in securing the participation of foreign countries in the Sesquicentennial Exposition held in that city. Again the following year he was appointed as special commissioner of the exposition in foreign countries. On September 28, 1925, under a Federal statute which required that the advisory commission having the Sesquicentennial Exposition in charge should be composed of two members from each State, President Coolidge appointed Mr. Beck as one of the two members from Pennsylvania on the national advisory commission of that exposition.

On April 30, 1925, Mr. Beck made an address at a club function in Philadelphia in which he expressed his intention of resuming his permanent home in Philadelphia. In the spring of 1926 he conducted negotiations for the securing of an apartment in that city. An apartment at 1414–1416 Spruce Street, in the building known as the Richelieu Apartments, was selected and agreed upon. Before executing the lease therefor Mr. Beck went to Europe on matters connected with the Sesquicentennial Exposition. The apartment was held for him until his return. On July 6, 1926, he executed the lease for this apartment in which it was provided that the rental should begin on June 1, 1926, the lease to be for one year with the privilege of renewal thereafter from year to year unless one of the parties thereto gave notice of discontinuance at least two months prior to the end of the current annual period. This was an unfurnished housekeeping apartment. The rental agreed upon was $110 per month, which the testimony showed Mr. Beck had paid continuously since the beginning of the lease. He immediately furnished the apartment with proper furniture and equipment.

It appeared from the testimony that Mr. Beck, with the exception of occasions when he was absent in Europe on business connected with the Sesqui-

centennial, and except for summer periods spent in his Seabright summer home, has occupied this apartment one or more times each week. His sister, Miss Helen Beck, has also occupied the apartment for a considerable portion of the time it has been under lease. On numerous occasions when Mr. Beck was in Philadelphia, and his sister also was occupying the apartment while Mr. Beck made it his headquarters, it frequently occurred that he would spend the night near by at the Art Club of Philadelphia, of which he has been a member for years. The apartment consists of a living room, a bedroom, a kitchen, and a bathroom. Mr. Beck has retained his Washington house fully furnished and has occupied it whenever he desired during all of this period. He testified that he retained his Washington residence in the main because his professional work largely consisted of cases before the Supreme Court of the United States. He has a law office in the city of Washington but not in partnership with any other attorney. His private business affairs are all conducted in Philadelphia, the Girard Trust Co. being his fiscal agent.

While Mr. Beck was a resident of New York he voted in that city. While he was Solicitor General of the United States, he registered and voted from his summer home in Seabright, N.J. The last vote he cast there was in the presidential election of 1924. He testified that on account of his intention to reidentify himself with his native city of Philadelphia, and to resume his citizenship in the State of Pennsylvania he refrained from voting elsewhere after 1924.

The law of Pennsylvania contains a requirement of a residence of one year in that State in order to qualify for registration for electoral purposes, except that in the case of one that has theretofore been a citizen of that State and, having resided elsewhere, has returned to the State of Pennsylvania, such residence requirement is reduced to six months. It is also required that in order to register in Pennsylvania one must have paid a tax of some sort; and if one has not paid a real estate or personal property tax, then one must pay a poll tax of 25 cents and hold the receipt at the time of registration. Mr. Beck paid this poll tax in September, 1927, and offered himself for registration as a voter in September, 1927, and was registered. He voted in the primaries in the city of Philadelphia on September 20, 1927. He was assessed for a personal property tax on a valuation of $20,000 in Philadelphia on October 3, 1927. This tax did not become payable until after the expiration of the year 1927.

After the primary of September 20, 1927, the Representative-elect from the first congressional district of Pennsylvania, Mr. Hazlett, resigned and to fill the vacancy so caused the proper Republican authorities nominated Mr. Beck for Representative in Congress on the Republican ticket. The Democratic Party nominated Mr. J. P. Mulrenan. At the election on November 6, 1927, Mr. Beck was elected by a majority of approximately 60,000.

As tending to prove his constant intention to reidentify himself with Philadelphia and to resume his citizenship thereof, Mr. Beck testified concerning his membership in many social and civic institutions of that city, most of these memberships having existed for many years. Among these were the Fairmount Park Art Association, of which he had been president

and is now vice president and general counsel—its purpose is the improvement of the city by the erection of works of art therein; the Philadelphia Commission, having a somewhat similar purpose as that of the foregoing association; the City Parks Association, having a somewhat similar purpose; the American Philosophical Society; the Art Club; the Legal Club; the Shakespeare Society; the Mahogany Tree Club; the Franklin Inn Club; the General Alumni Society of the University of Pennsylvania; the New England Society of Pennsylvania; the Historical Society of Pennsylvania; the Five O'Clock Club; the Orpheus Club; the Friendly Sons of St. Patrick. It is proper to say in connection with the memberships in these clubs and associations that two of the clubs carry a separate roster for resident and nonresident memberships. Mr. Beck stated that he did not personally draw the checks for membership dues in these organizations but that this matter was taken care of by his secretary. In the late fall of 1927 his attention was called to the question as to whether he ought not to change from the nonresident classification to resident classification in the Art Club. This he attended to as soon as the matter was brought to his notice. In the case of the other club having the two classifications, he was carried as a nonresident member.

It is proper to add also that the house in Washington is an attractive, commodious, well-furnished house, in which there is much more room and much more valuable furniture and equipment than in the Philadelphia apartment, and that in the matter of number of days actually spent by Mr. Beck in these two places of abode since the acquiring of the Philadelphia apartment, more days have been spent in the Washington house than in the Philadelphia apartment. It further appeared that Mr. Beck had on occasions when he was a guest in hotels registered from Washington, and that his automobiles bear license plates provided by the District of Columbia.

### THE CONSTITUTIONAL PROVISION

Paragraph 2 of section 2, Article I of the Constitution provides as follows:

> No person shall be a Representative who shall not have attained the age of 25 years and been 7 years a citizen of the United States and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

### THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION

To determine whether the facts applicable to the case of Mr. Beck place him within the meaning of the framers of the Constitution in their use of the word "inhabitant," it is of the greatest importance to consider the debate which occurred at the time this provision was adopted. This particular provision of the Constitution was considered on Wednesday, August 8, 1787, and as it came before the convention the provisions were the same as now except that citizenship of the United States for a period of three years was required, and it was also required that the Representative should be a "resident" of the State from which he should be chosen. The following is the entire debate contained in the Madison Papers on this paragraph of the Constitution:

Col. Mason was for opening a wide door for emigrants; but did not chuse to let foreigners and adventurers make laws for us & govern us. Citizenship for three years was not enough for ensuring that local knowledge which ought to be possessed by the Representative. This was the principal ground of his objection to so short a term. It might also happen that a rich foreign Nation, for example Great Britain, might send over her tools who might bribe their way into the Legislature for insidious purposes. He moved that "seven" years instead of "three" be inserted.

Mr. Govr. Morris seconded the motion, & on the question, All the States agreed to it except Connecticut.

Mr. Sherman moved to strike out the word "resident" and insert "inhabitant," as less liable to misconstruction.

Mr. Madison seconded the motion. Both were vague, but the latter least so in common acceptation, and would not exclude persons absent occasionally for a considerable time on public or private business. Great disputes had been raised in Virginia, concerning the meaning of residence as a qualification of Representatives which were determined more according to the affection or dislike to the man in question, than to any fixt interpretation of the word.

Mr. Wilson preferred "inhabitant".

Mr. Govr. Morris was opposed to both and for requiring nothing more than a freehold. He quoted great disputes in New York occasioned by these terms, which were decided by the arbitrary will of the majority. Such a regulation is not necessary. People rarely chuse a nonresident. It is improper as in the 1st branch, *the people at large,* not the states, are represented.

Mr. Rutlidge urged & moved that a residence of 7 years should be required in the State wherein the Member should be elected. An emigrant from New England to South Carolina or Georgia would know little of its affairs and could not be supposed to acquire a thorough knowledge in less time.

Mr. Read reminded him that we were now forming a National Government and such a regulation would correspond little with the idea that we were one people.

Mr. Wilson enforced the same consideration.

Mr. Madison suggested the case of new states in the West, which could have perhaps no representation on that plan.

Mr. MERGER. Such a regulation would present a greater alienship among the States than existed under the old federal system. It would interweave local prejudices and State distinctions in the very Constitution which is meant to cure them. He mentioned instances of violent disputes raised in Maryland concerning the term "residence".

Mr. Elseworth thought seven years of residence was by far too long a term: but that some fixt term of previous residence would

be proper. He thought one year would be sufficient, but seemed to have no objection to three years.

Mr. Dickinson proposed that it should read "inhabitant actually resident for —— year". This would render the meaning less indeterminate.

Mr. WILBON. If a short term should be inserted in the blank, so strict an expression might be construed to exclude the members of the Legislature, who could not be said to be actual residents in their States whilst at the Seat of the General Government.

Mr. MERGER. It would certainly exclude men, who had once been inhabitants, and returning from residence elsewhere to resettle in their original State; although a want of the necessary knowledge could not in such case be presumed.

Mr. Mason thought 7 years too long, but would never agree to part with the principle. It is a valuable principle. He thought it a defect in the plan that the Representatives would be too few to bring with them all the local knowledge necessary. If residence be not required, rich men of neighbouring States, may employ with success the means of corruption in some particular district and thereby get into the public Councils after having failed in their own State. This is the practice in the boroughs of England.

On the question for postponing in order to consider Mr. Dickinsons motion:

New Hampshire, no. Massachusetts, no. Connecticut, no. New Jersey, no. Pennsylvania, no. Delaware, no. Maryland, ay. Virginia, no. North Carolina, no. South Carolina, ay. Georgia, ay.

On the question for inserting "inhabitant" in place of "resident"—agreed to nem. con.

Mr. Elseworth & Col. Mason move to insert "one year" for previous inhabitancy.

Mr. Williamson liked the Report as it stood. He thought "resident" a good enough term. He was against requiring any period of previous residence. New residents if elected will be most zealous to conform to the will of their constituents, as their conduct will be watched with a more jealous eye.

Mr. Butler and Mr. Rutlidge moved "three years" instead of "one year" for previous inhabitancy.

On the question for 3 years:

New Hampshire, no. Massachusetts, no. Connecticut, no. New Jersey, no. Pennsylvania, no. Delaware, no. Maryland, no. Virginia, no. North Carolina, no. South Carolina, ay. Georgia, ay.

On the question for "1 year":

New Hampshire, no. Massachusetts, no. Connecticut, no. New Jersey, ay. Pennsylvania, no. Delaware, no. Maryland, divided, Virginia, no. North Carolina, ay. South Carolina, ay. Georgia, ay.

It is evident that in this debate the framers of the Constitution were seeking for a nontechnical word, the main purpose of which would be to insure that the Representative, when chosen, from a particular State should have adequate knowledge of its local affairs and conditions. Mr. Madison, Mr. Wilson, and Mr. Mercer all emphasized that it was not desired to exclude men who had once been inhabitants of a State and who were returning to resettle in their original state, or men who were absent for considerable periods on public or private business. The convention by vote deliberately declined to fix any time limit during which inhabitancy must persist. To get clearly in mind the thought which the word "inhabitant" held in the minds of the framers of the Constitution, it is well to recall that in the days of the Colonies the people who constituted the body politic of a colony were quite generally described in the charters and other public documents connected with the governments of the Colonies as being "subjects" of Great Britain and "inhabitants" of the colony in which they were members of the body politic.

A number of examples of this are recited in the volume of law arguments taken in the hearings before this committee, beginning on page 38. To these men an "inhabitant" was one who had an abode within a colony and was recognized and identified as one who was a member of the body politic thereof. The fact that he might absent himself physically from the colony for a very considerable period of time did not militate against the recognition of him as an inhabitant of such a colony, and this remained true after the Colonies had achieved their independence and had become independent States. Thus, though George Washington was for the greater part of 16 years absent from Mount Vernon and Benjamin Franklin was absent for years from Pennsylvania, no one would have considered there was any cloud on their title as inhabitants, respectively, of the States of Virginia and Pennsylvania. In those early times it was the uncommon rather than the common thing that a man should have more than one place of abode. In these modern times it is quite common that men have two or more places of abode to which they may repair according to the season of the year, according to their business convenience, or according to the public duties which they may be called upon to discharge, This is true of many Members of each House of the Congress to-day, but the principle has not changed. Admittedly a man can have but one inhabitancy within the meaning of the Constitution at a given time. Where this may be is a mixed question of intent and of fact.

To be an inhabitant within the Constitution, it seems clear that one must have first, as a matter of fact, a place of abode, and, second, that this place of abode be intended by him as his headquarters; the place where his civic duties and responsibilities center; the place from which he will exercise his civic rights. We think that a fair reading of the debate on this paragraph of the Constitution discloses that it was not intended that the word "inhabitant" should be regarded in a captious, technical sense. Can it be that the fathers intended that to determine whether one was an inhabitant of a particular place that the number of days which he actually spent there in a given period should be counted and his absences balanced against the periods of his physical presence? Can it be that the fathers intended that the

tenure of his holding of a particular abode, whether it be by fee-simple title or by leasehold, should govern the question as to whether it was the place of inhabitance? We feel positive that such a construction would in no sense carry out the meaning which the framers of the Constitution regarded as contained in this word. Further, such a technical attempt at construction would result in the very confusion which the debate showed the framers hoped to avoid by the rejection of the word "resident." We think that a fair interpretation of the letter and the spirit of this paragraph with respect to the word "inhabitant" is that the framers intended that for a person to bring himself within the scope of its meaning he must have and occupy a place of abode within the particular State in which he claims inhabitancy, and that he must have openly and avowedly by act and by word subjected himself to the duties and responsibilities of a member of the body politic of that particular State.

That Mr. Beck has such an abode in the State of Pennsylvania cannot be questioned. That he had obtained it a year and a half before his election to Congress is unquestioned. That he had occupied it according to his convenience one or more times a week during that period was testified to by Mr. Beck and certainly was not disproved by any other evidence. It is true that during a part of the period under discussion he was absent from the country, but then he was absent on business connected with the city of Philadelphia, and certainly such absence ought not to be counted against his being an inhabitant, the absence being on public business connected with the very city in which he claims to be an inhabitant. It is true too that he spent a short portion of time in the summer at his place at Seabright, N.J., but it will be an unusual conclusion if it is held that for a man to absent himself from the place of his inhabitance in order to live for a time at his summer place raises a cloud upon the legal continuance of his inhabitancy. So much for the fact as to a place of abode in Pennsylvania.

As to Mr. Beck's intention, let it be said that he testified before the committee, fully and frankly, as to all the circumstances and facts which were asked of him; as fully and frankly disclosing those facts which seemed, possibly, to militate against him as to any. He solemnly testified under oath before the committee that when he went to New York to live in 1903 he then had the intention some time to return to Philadelphia, his native city, and resume his citizenship in that city and reidentify himself with its affairs. Hence, he kept his memberships in all the civic associations in which he had acquired membership before his leaving. He testified that this had always been his intention during all of the time he was away from Philadelphia.

He testified that when he left New York in 1920 and came to Washington to take up the duties of Solicitor General of the United States that he had acquired a competence, and that it was his intention, if found acceptable to the public, to devote the remainder of his life to public service; and that when his duties were ended as Solicitor General he began negotiating for a place in Philadelphia so that he might carry out the intention he had held all those years to return and reidentify himself with Philadelphia and with its public affairs. He testified that at that time he entertained the hope that it might occur that he could have a seat in Congress from that city.

In carrying out his desire to give himself to the public service of that city, he gave very much of his time to the Sesquicentennial Exposition, accepting a commission from the mayor of the city and from the President of the United States to a high position connected with that exposition, that he traveled abroad to foreign countries to engage their interest and cooperation in making the exposition a success, giving his time and efforts thereto without any remuneration.

He solemnly testified under oath that since June 1, 1926, his intention has been to be a resident of the State of Pennsylvania and in the constitutional sense to be an inhabitant of that State, and to subject himself to all the duties as well as to enjoy the privileges of that status.

There is no testimony and no fact which would warrant the committee in making a finding that this statement is not entirely true.

Further than this, Mr. Beck is now and was at the time of his election a "legal resident" of Pennsylvania. We do not think that this can be disputed. He had a habitation there and at the expiration of more than the required time under the constitution of Pennsylvania he presented himself for registration, asserted his intention to be a resident of Pennsylvania, and was registered as a voter. By that act he subjected himself conclusively to all the duties of a resident of Pennsylvania. Thereupon he became subject, among other things, to personal taxation within the State of Pennsylvania, subject to jury duty there, and, if he died, conclusively subject to the inheritance tax laws of that State. In other words, he subjected himself to all the duties that fall upon a resident of that State and could not be heard to claim that he was not a resident there.

Mr. Beck is a "citizen" of Pennsylvania. We do not think this can be disputed. Born in that State, after having left it he has returned and maintained a legal residence more than sufficiently long to satisfy the constitutional provision of that State as to citizenship therein.

Mr. Beck is a legal elector in the State of Pennsylvania. We do not think this can be disputed. Having maintained a legal residence in that State more than sufficiently long to qualify him for the electoral privileges, he attended to the formalities thereof, paid the poll tax required, offered himself to the registration board for registration, was registered as a voter without challenge, and thereafter and before his election performed the privilege of voting in an election without challenge.

We do not think that the framers of the Constitution intended by the use of the word "inhabitant" that the anomalous situation might ever arise that a man should be a citizen, a legal resident, and a voter within a given State and yet be constitutionally an inhabitant elsewhere. If any such conclusion could be reached we might have the peculiar result in this country of a man being a resident, a citizen, and a voter in a given State, and yet within the constitutional sense barred from the right of representing a district in that State in Congress, but having the right to represent a district in another State in Congress. No such interpretation can fairly be read into this provision. We think that Mr. Beck having legally subjected himself to the duties and responsibilities of a citizen and an inhabitant of Pennsylvania, having maintained an habitation there, and having occupied the same regularly,

though not continuously, is also entitled to the rights of a citizen and an inhabitant of Pennsylvania. We think that such a finding is entirely within the meaning, the spirit, and the letter of the Constitution.

THE PRECEDENTS

We think that a proper interpretation of the facts in the early case of Philip B. Key in the Tenth Congress would be controlling in the present case. Mr. Key was a native of Maryland and a citizen and resident of that State at the time of the adoption of the Constitution. He was never a citizen or resident of any other of the United States. But in 1801 he removed from Maryland to his house in Georgetown, D.C., where he continued to reside until 1806. During that period he had no other habitation. In 1805, however, he had purchased land in Maryland and had contracted for the erection of a summer home thereon, intended for his own use. On September 18, 1806, he removed with his family into this summer home, which was not yet entirely completed. On October 6, 1806, just 18 days later, an election occurred in which Mr. Key was elected to a seat in the House of Representatives. He had left his house in Georgetown, D.C., fully furnished. On October 20, 1806, he removed with his family and household to his house in the District of Columbia again, where he lived until July, 1807, in which month he returned to his Maryland house and lived in it until October 23, 1807. On this latter date he returned to his house in the District of Columbia to attend to his duties in Congress. During the five years that he had no habitation in Maryland and during which his sole habitation was in the District of Columbia he continued to practice law in Maryland and had not practiced in the District of Columbia. But he had in January, February, and March, 1806, declared that he intended to reside in Maryland and that he bought the land with that intention. It was admitted that the house which he built in Maryland and which he occupied only 18 days before the election was fitted only for a summer residence and was much inferior to the house in the District of Columbia, and that the latter was left practically with its furnishing complete whenever the family went to Maryland. This case will be found reported on page 417 of the first volume of Hinds' Precedents.

In the argument before the committee an attempt was made to distinguish this case from the Beck case in two particulars, first, that Mr. Key when he left Maryland did not establish a residence in any other State but only in the District of Columbia, while Mr. Beck when he left Pennsylvania established a residence first in New York and later in the District of Columbia. We are unable to see that this creates any distinction between the two cases as a matter of legal contemplation. Mr. Key utterly ceased to be an inhabitant of Maryland in 1801. Mr. Beck has fully ceased to be an inhabitant of Pennsylvania in 1903. We fail to see wherein any distinction as a matter of law can arise on the question of inhabitancy due to the fact that one moved into the District of Columbia and the other moved into the State of New York. In each case the habitation in the native State completely ceased. In both cases, if it were revived, the revival occurred by proceeding from the District of Columbia back to the native State. In the case of Mr. Key, the new inhabitancy of the State of Maryland existed for 18 days prior

to the election. In the case of Mr. Beck, it existed for a year and a half prior to the election.

The other point of distinction that was attempted to be raised to void the effect of the Key case on the present issue in the argument was that in the Key case Mr. Key owned outright the house in Maryland to which he moved 18 days prior to his election, while Mr. Beck's is a leasehold. We can not conceive that there is any merit in this attempted distinction. It is as common in this country for a man's habitation to be held by lease as it is by fee ownership. It is the intent under which he occupies it which is the controlling feature. The House of Representatives held that Mr. Key was, within the constitutional sense, an inhabitant of Maryland and entitled to his seat in the House of Representatives.

A case which was relied upon in the argument to uphold the exclusion of Mr. Beck from his seat was the case of John Bailey, elected from Massachusetts to the Eighteenth Congress, reported on page 419 of the first volume of Hinds' Precedents. The facts in that case were as follows:

On October 1, 1817, Mr. Bailey, who was then a resident of Massachusetts, was appointed a clerk in the Department of State. He immediately repaired to Washington and entered upon the duties of his position and continued to hold the position and reside in Washington until October 21, 1823, when he resigned the appointment. It did not appear that he exercised any of the rights of citizenship in the District, and there was evidence to show that he considered Massachusetts as his home, and his residence in Washington only temporary. It was shown that Mr. Bailey resided in Washington in a public hotel with occasional absences on visits to Massachusetts until his marriage in Washington, at which time he took up his residence with his wife's mother. He never exercised the right of suffrage in Massachusetts after leaving there for Washington.

The election at which Mr. Bailey was chosen as a Representative was held September 8, 1823, at which time he was actually residing in Washington in his capacity as clerk in the State Department. This case was debated in the House for seven days and, of course, many things were said, but the facts in it are what seem important in its use as a precedent. Mr. Bailey had no abode in Massachusetts. Before he came to Washington he lived with his parents in their house. He had none of his own, either leased or owned. In support of the committee, it was stated "had he left a dwelling house in Massachusetts in which his family resided a part of the year; had he left there any of the insignia of a household establishment, there would be indication that his domicile in Massachusetts had not been abandoned."

We think that the Bailey case is clearly distinguishable from the Beck case in that Mr. Bailey had no habitation, no place of abode, under his control in Massachusetts at any time after he accepted the appointment in Washington. The very report of the committee in the Bailey case shows that had he maintained any place of abode or insignia of domestic establishment to which he had repaired from time to time, the holding of the committee would have been otherwise.

No doubt it would do violence to words to hold that a man was an inhabitant of a place where he had no habitation. The House of Representatives held that Mr. Bailey was not entitled to his seat.

The case of Nathan B. Scott, elected a Senator from the State of West Virginia in 1899, was contested on the ground that he was not an inhabitant of the State of West Virginia at the time he was elected. Mr. Scott resided at Wheeling, W. Va., until January 1, 1898, when he was appointed Commissioner of Internal Revenue, at which time he came to Washington to discharge the duties of that office. His intention was to retain his residence and habitation at Wheeling, W. Va., and in carrying out that intention he voted in the election held November 8, 1898, at Wheeling, W. Va. He had no intention to change his domicile to Washington from Wheeling and he claimed to be an inhabitant of Wheeling, W. Va. The committee found that Mr. Scott was an inhabitant of Wheeling, W. Va., at the time he was elected to the Senate of the United States.

In the Bailey case, Mr. Bailey did not exercise the rights of citizenship in the State of Massachusetts, nor did he vote in the State of Massachusetts. In the Scott case, Senator Scott did, and the Senate found that he was an inhabitant of the State of West Virginia.

The committee desires to direct attention to the language in the decision of the Supreme Court of the United States in the case of Shelton *v.* Tiffln (6 Howard, 163, 185). The Federal courts had no jurisdiction in this controversy, unless within the meaning of section 2 of Article III of the Constitution of the United States, the parties thereto were citizens of different States. Hence, this question being raised, its solution was necessary to the decision of the court. In this case, the Supreme Court uses the following language:

> On a change of domicile from one State to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive on the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient.

It is true that a holding of even the Supreme Court of the United States is not binding on the House of Representatives in the question at bar, since this question is committed by the Constitution solely to the House of Representatives, but we think the opinion of the Supreme Court of the United States ought to be regarded with the highest respect and should be very persuasive in deciding a similar question. It will be remembered in this connection that Mr. Beck registered as a voter and exercised the right of suffrage in Philadelphia in the month of September, prior to the November in which he was elected to Congress.

It is true that in the many court decisions that have been rendered in various courts of the States, under different legal situations, many contradictory definitions of the words "inhabitant" and "resident" may be found. We are impressed, however, with the conviction that the framers of the Constitution were seeking to use the word inhabitant in the plain, nontechnical

sense in which it had been understood as explained above up to the time of the framing of the Constitution, and that their purpose was to require those who represented the several States in the House of Representatives to be identified with the local interests of those States by having a habitation therein and being in addition a member of the body politic of the particular State from whence they came to the House.

It was argued before the committee that such a construction would lead to the existence of "rotten boroughs" in the United States as once existed in England. We think this argument misapprehends what the "rotten boroughs" were. It will be remembered that the "rotten boroughs" consisted of small communities with few inhabitants, which were given representation in Parliament out of all proportion to the population of other areas and large centers. In other words, the "rotten boroughs" situation in England resulted in insufficient representation for large bodies of the population as compared to many small communities. We call attention to the fact that if a man, because he has business in the District of Columbia and arranges a place of abode there so that he may conveniently care for such business when necessity occasions it, whether it be public or private, is to be denied for that reason the right to have a habitation within one of the States, to acquire citizenship there, to be an elector there, to take his part in exercising the duties and responsibilities of citizenship, it will result in a much closer approximation to the "rotten borough" situation which has been described and condemned.

After all, we must rely upon the integrity, the patriotism, and the good common sense of the electors in the various districts with respect to the choice of a fit membership in the House of Representatives. This is a part of the very genius of representative government. And we do not think that it is proper to seek for strained and captious interpretations of this paragraph of the Constitution to find reasons for rejecting men who have been chosen through the deliberate will of their constituents as indicated at the polls. We believe that every word of the Constitution should be upheld, but we do not think that men who have been chosen to represent a district should be excluded unless their case presents a clear violation of the Constitutional provision. We are convinced that such is not the case in the matter now before us. We believe that Mr. Beck is clearly entitled to his seat.

For the above reasons, the committee recommends the adoption of the following resolution (H. Res. 283):

> *Resolved,* That James M. Beck is entitled to his seat in the Seventieth Congress as a Member of the House of Representatives from the first congressional district of the State of Pennsylvania.

The following minority views were submitted by Mr. Gordon Browning, of Tennessee, and Mr. T. Webber Wilson, of Mississippi:

We, the minority, regret to find ourselves in disagreement with a majority of the committee who report that Mr. James M. Beck is entitled to a seat in the House of Representatives from the first Pennsylvania district. If the

question involved were not one of vast importance, in our opinion, we would not interpose our opposition; for there could be no personal objection to Mr. Beck as a Member. Neither is there any political significance that could attach to the challenge of his right to sit, as anyone from that district at this time undoubtedly would be of his political faith. And we recognize fully that the renown of Mr. Beck as a constitutional lawyer and a man of high intellectual attainments necessarily is persuasive with the committee.

But the issue is one which goes to the vitals of the National Constitution. Mr. Beck in his opening statement expressly recognized that the question is not free from difficulty. The question arises as to his qualification under Article I, section 2, of the Constitution, wherein it says:

> No person shall be a Representative who shall not have attained to the age of 25 years, and been 7 years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen.

Our conviction is that he was not an inhabitant of the State of Pennsylvania in November, 1927, when chosen.

Mr. Beck was born in Philadelphia, July 9, 1861, and had his home in that State until 1900, when he came to Washington, D.C., as Assistant Attorney General. In 1903 he resigned his position in Washington, gave up his residence in Philadelphia, and moved to New York to practice law with a view to securing a competence. He owned one or more homes in New York where he lived and voted and practiced law until November, 1920. At that time he sold his New York home and purchased a commodious residence on Twenty-first Street NW., Washington, D.C., to which he immediately moved his family, his extensive personal library, his art treasures, and all his personal belongings he holds most dear.

In June, 1921, Mr. Beck was appointed Solicitor General of the United States by President Harding, and held that position until June, 1925, when he resigned on account of his eyes failing. He immediately established a law office in the Southern Building, Washington, and specialized in United States Supreme Court practice, which law office he still maintains. He also resumed his connection with his old law firm in New York. He does not practice law in Pennsylvania, and has not since 1900.

For several years he has owned and used a summer home in Seabright, N.J., on the ocean front. After moving from New York in 1920 he established a voting status at his summer home and he and his wife voted there in the 1924 presidential election by mail. In November, 1927, when chosen he sustained the same relation as to voting status in New Jersey which he did in 1924 and does at the present time, except expressing an intention, which was not carried out, to transfer it to Pennsylvania. His residential connection there is exactly the same, having used that residence for himself and family the last summer months. So far as the New Jersey authorities are concerned, no act of Mr. Beck had shown withdrawal of claims for voting privileges in that State.

In the early spring of 1926 he went to Philadelphia, and with Mr. Greenfield, a real-estate man who is also prominent politically, looked at some two

or three apartments in the first congressional district with a view to retaining one for the specific purpose of running for Congress from that district. Mr. Beck states that he had two purposes in view by this. One was to again establish a status in Philadelphia as one of its people. The other was to run for Congress from that district. As to the latter purpose he said:

> The seat in Congress was then a possibility undoubtedly, and I would not want to say, and could not say, truthfully, that it had nothing to do with the renting of the apartment. (Rec. p. 58.)

Again he states:

> The apartment was selected in full anticipation of the fact that I might run for Congress. My point is that my taking any habitation in Philadelphia had as its dominant purpose the desire to be reidentified with the political life of Philadelphia, quite irrespective of whether I ran for Congress or not. But the selection of this locality had in mind the possibility of my going to Congress; and it also had in mind that it was very accessible to the main thoroughfare of Philadelphia, and right around the corner from my club. (Rec. p. 61.)

Mr. Vare, the then sitting Member from the first Pennsylvania district, was at that time a candidate for nomination to the United States Senate.

But no apartment was then agreed on, and Mr. Beck went to Europe on a business mission in April, 1926. He returned early in June. On the 6th of July following it seemed that Mr. Greenfield had put in order a two-room apartment at 1414 Spruce Street, and Mr. Beck then leased it as of date June 1, 1926. This was a yearly renewable lease, unless either party exercised the option of giving a legal notice of its termination. The apartment was then furnished by Mr. Beck, and he still holds it and pays rent on it.

His unmarried sister, Miss Helen Beck, has occupied this apartment continuously for a year; and while she is in it he goes to the Art Club to sleep when in Philadelphia rather than incommode her. The apartment is equipped with a kitchenette, but Mr. Beck has never eaten a meal there. It has one bedroom.

Mr. Beck states that he is in Philadelphia most every week; that he frequently goes to New York on business, and stops over there to break the trip. He was carried as a nonresident member of several clubs in Philadelphia at the time of election and until January last. In none of them was he listed as a resident member.

The janitor of this apartment house, who admits he is entirely unreliable, when approached on the premises, and without notice of the purpose of the inquiry, first said he had only seen Mr. Beck there three times in the 18 months. When placed on the stand he finally estimated that he had known of him being there 15 or 20 times.

On page 66 of the record, Mr. Beck gives the status of his family as follows:

> Mr. KENT. Now, your family consists of whom?

> Mr. BECK. My wife and myself. I have two children.
>
> Mr. KENT. Where are they?
>
> Mr. BECK. My daughter is the wife of the United States consul at Geneva, my son has been in London ever since he was in the Army in France. But neither of my children live with Mrs. Beck and myself. We live alone.

And there can be no question but that Mr. Beck and his wife "live alone" in Washington, D.C., and have lived here since November, 1920, have had this as their domicile, their abode, their habitation. Mr. Beck always registers from Washington when he goes to hotels, has his merchandise for personal comfort sent to him here, has his automobiles for every use registered here; and at no time has he treated the small two-room apartment in Philadelphia as a real, bona fide habitation for any purpose except a gesture at compliance with the constitutional requirement for an inhabitant.

So his claim to inhabitancy is based on the rental of this apartment, which is in reality a place for his unmarried sister to live, with occasional visits to the city of Philadelphia by him when he would stop largely at the Art Club or a hotel; his testimony of intent to return; that he transacts his private affairs in Pennsylvania; and that he attempted to qualify and did vote there in a primary in that State in 1927.

We can not ascribe to the doctrine that intention is the controlling part of inhabitancy. Mr. Beck quotes approvingly a letter relating to his speech in Philadelphia, on April 30, 1925, to the effect that he was "then in a position to take a permanent home again in Philadelphia, where, among your old friends and your books, you would indulge yourself for the balance of your life." Of this Mr. Beck said, "that is just what I said in substance." It would be a strange perversion of every rule to accept even undisputed intentions, shown by declarations, in the face of a state of facts, such as we have in this case, to prove inhabitancy. In truth, Mr. Beck never took a permanent home again in Philadelphia. Had he done so, and moved his family and his books and household there before election, as his expressed intention was, no question would now be made as to his eligibility. Intention, in a case of this kind, is a deduction or conclusion of law founded on fact. We must determine from the facts whether inhabitancy exists. It certainly can not be shifted or designated at the whim or pleasure of the individual affected.

Granting that he had the intention to return, this was outweighed by his desire to inhabit Washington, to practice law here, to have advantage of proximity to the United States Supreme Court, to all Federal activities, to retain all his books, works of art, home, servants, automobiles, mental endeavors, entirely without the borders of the State of Pennsylvania.

As to the transaction of his private affairs in Pennsylvania, it is a fair inference from the proof that he has $20,000 in securities or some other form of property in that State, as he submitted to an assessment in that sum. But he pays taxes in New Jersey on both real and personal property, pays his income tax from Washington, as well as a realty tax here, no doubt on more property value than that for which he is assessed in Pennsylvania. We can find no burdens of citizenship carried by Mr. Beck in that State which he

does not bear both in New Jersey and the District of Columbia, except 25 cents paid in September last for an occupational tax.

It is contended that a mere political status meets this requirement of the Constitution. If a political status could be counted the sole qualification for holding this office under the Federal Constitution, a citizen just naturalized, and having acquired a voting privilege in his State could sit in Congress, although the Constitution says he must have "been seven years a citizen of the United States"; and likewise, if the citizen is 21 years of age and can vote in his State he could come to Congress in the face of the constitutional provision that "no person shall be a Representative who shall not have attained the age of 25 years." The burdens of citizenship are definitely placed on these two classes who are forbidden to hold a seat in Congress even though their constituents should choose them unanimously. There is no more discrimination against one who has met the requirements for voting in a State, but who is not an inhabitant of that State within the meaning of our National Constitution, than there is against these others so limited in this privilege.

A mere voting privilege is granted by each separate State in its own way. If a voter can satisfy the requirements of a State law, he can exercise the privilege of franchise. But compliance with the requirements of the Federal Constitution in qualifying for membership in this House is entirely independent of State regulation. A regulation. A voting status can not be the measure of inhabitancy. If it had been thus intended, the Federal Constitution would have remained silent and thereby left the matter to the separate States. This would amount to the same thing as expressly telling each of the States to fix this qualification, when they would leave that right in the absence of any expression by the Federal Constitution.

One of the conclusive reasons that they regarded a "citizen" and an "inhabitant" as entirely different designations is that they used both in this same clause, this same sentence, for separate and distinct qualifications for membership. No trivial matter of verbiage or curious distinction is necessary to a sensible meaning of this term as used by great men.

The word was substituted for "resident," and the reason clearly given by the great Madison was to allow a temporary absence from a true domicile, not to place it on a casual presence in a temporary domicile.

Mr. Beck was not a qualified elector of the State of Pennsylvania at the time he voted in the primary of September, 1927, nor at the time of his election to Congress. The constitution of that State requires that an elector-must be a "resident" of the State for 6 months next before voting in his case, and 12 months for one who has never before been a citizen of Pennsylvania. And the courts of that State have repeatedly and uniformly held as in Fry's election case (71 Pa. 302, p. 305):

> When the Constitution declares that the elector must be a resident of the State for one year, it refers beyond question, to the State as his home or domicile, and not as the place of a temporary sojourn. . . .

> These extracts will enable us to understand more clearly the term "residence," as denoting that home or domicile which the third article of the Constitution applies to the freeman of the Commonwealth. It means that place where the elector makes his permanent or true home, his principal place of business, and his family residence, if he have one; where he intends to remain indefinitely; and without a present intention to depart; when he leaves it he intends to return to it, and after his return he deems himself at home.

It can not be reasonably contended that Mr. Beck has his home or domicile in Pennsylvania at that time. It was here in Washington, where it has been since November, 1920, the place where he has his family life, where he comes when he is sick, his true home, the only establishment he has had which resembles a home or permanent domicile, where he keeps his five servants, two automobiles, and the only place he keeps these or any other semblances of home life to comport with his accustomed comfort.

In addition to this, he did not procure his occupational tax receipt on the 9th of September, 1927, legally. This is not meant in the sense of imputing bad faith to Mr. Beck, but the law requires specifically that this must be purchased from the office of the receiver of taxes in person or from a deputy at the place of registration on any of the registration days provided by law; and the only exception to this is when a written and signed order is given by the elector to a person to purchase same for him. This was not done. The receipt was delivered to Mr. Beck in the office of Mr. Vare, not on registration day, not at the place for registration, not in the office of the receiver of taxes, and after being procured by some person with no written authority to purchase same. It is expressly made unlawful in Pennsylvania for any person to vote or attempt to vote upon a tax receipt so obtained in violation of this law. It appears from the testimony by Harry W. Keely, receiver of taxes for the city of Philadelphia, Mr. Beck, and others, that this receipt was not issued in accordance with law and could not be used lawfully. It was only 11 days old when used by him, whereas the law directs that it must have been purchased 30 days before the election in which it is used. But the disqualification for voting which is in no way technical is that of failure to comply with the requirements of a "resident," since his real home, his actual established home, is elsewhere than in Pennsylvania, where at best he only has a place of temporary sojourn.

But if Mr. Beck had been qualified and had legally voted in all Pennsylvania elections, this would in no way be conclusive of inhabitancy. In the Virginia case of Bayley *v.* Barbour (47th Cong., Hinds, vol. 1, p. 425) the House held as follows:

> In answer to this position, without deeming it necessary upon the facts of this case to enter into the constitutional signification of inhabitancy, it is only necessary to say that the right to vote is not an essential of inhabitancy within the meaning of the Constitution, which is apparent from an inspection of the Constitution itself. In Article I, section 2, the electors of Members of Con-

> gress "shall have the qualifications requisite for electors of the most numerous branch of the State legislature," but in the succeeding section, providing for the qualifications of Members of Congress, it is provided that he shall be an inhabitant of the State in which he is chosen. It is reasonable to conclude that if the elective franchise was an essential the word "elector" would have been used in both sections, and that it is not used is conclusive that it was not so intended.

And if a voting status "is not an essential of inhabitancy within the meaning of the Constitution," but is vitally essential to citizenship or a political status, it would be sophistry indeed to hold them synonymous.

The term "inhabitant" has never been defined by the courts in connection with this clause of the Constitution, as the House is the sole judge of the qualifications of its Members, so we must look elsewhere for an authentic definition. The intent of the framers should govern if that can be ascertained, and we insist it is very patent from the only definite construction of the word which has ever been in common usage. There has been no marked change in the commonly accepted meaning of the term since 1787, when the Constitution was framed.

Webster's New International Dictionary says of inhabitant:

> "One who dwells or resides permanently in a place, as distinguished from a transient lodger or visitor."
>
> "It ordinarily implies more fixity of abode than resident."
>
> "Inhabitant, the general term, implies permanent abode; citizen, enjoyment of the full rights and privileges of allegiance."

Entick Dictionary, London, 1786, gives the following:

> "Inhabitant, one who dwells in a place."

Dr. Samuel Johnson's Dictionary, 1770, gives the following:

> "Inhabitant, dweller; one who lives or resides in a place."

Ash's Dictionary, 1775, gives the following:

> "Inhabitant: A dweller, one that resides in a place."

Dyche's English Dictionary, 1794, gives the following:

> "Inhabitant: One who lives in a place or house, a dweller."

Law dictionaries contemporaneous with the framing of the Constitution do not vary from this. A new Law Dictionary, by Giles Jacob, ninth edition, published in London, 1772, gives the following:

> "Inhabitant: Is a dweller or householder in any place."

Doctor Burn's Law Dictionary, published in London, 1792, Vol. II, page 21:

> "The word Inhabitant doth not extend to lodgers, servants, or the like; but to householders only."

Burrill's Law Dictionary says:

> "The Latin Habitara, the root of this word, imparts by its very construction frequency, constancy, permanency, closeness of connection, attachment, both physical and moral; and word 'in' serves to give additional force to these senses."

Black's Law Dictionary:

> "Inhabitant; one who resides actually and permanently in a given place, and has his domicile there."

In Book I, chapter 19, section 213, Vattel says:

> "The term 'inhabitant' is derived from abode and habitation, and not from political privileges."

We think the test of inhabitancy is a permanent and fixed abode with the personal presence of the individual in that place, ordinarily; and absence from it must be for a cause temporary in its nature, with the intent to return to said place of abode to reside as soon as the purpose of the said absent mission is accomplished. The absent mission may be in its nature for pleasure, business, or public duty. When said absence is for the purpose of engaging in a business or occupation which calls for the establishment of a home and indeterminate presence therein pursuant to said activity, we consider the former inhabitancy broken, or suspended at least until it again takes on the degree of permanence it formerly had. The overwhelming weight of authority, both as to legal construction and definition, support this view.

Every recognized authority, whether legal or otherwise, excludes the idea of temporary residence, and holds that the term "inhabitant" carries with it the necessity of a fixed and permanent home, the place at which one is habitually present under ordinary circumstances, and to which, when he departs for temporary purposes, he intends to return. This is the common and only justified construction of the word.

The constitution of New Hampshire, adopted in 1792, shows clearly what the common acceptation and meaning of this term was in the following declaration:

> And every person qualified as this constitution provides, shall be considered an inhabitant, for the purpose of electing and being elected into any office or placed within this State, in the town, parish, and plantation where he dwelleth or hath his home.

The constitution of Massachusetts, adopted in 1780, Chapter I, section 2, Article 2, declares that——

> to remove all doubts concerning the word "inhabitant," in this constitution, every person shall be considered an inhabitant (for

> the purpose of electing and being elected into any office or place within this State) in that town, district, or plantation, where he dwelleth or hath his home.

This constitution was amended in 1821 to confer the right to vote on citizens who have resided in the State one year, and in the town or district six months. In 46 Mass. (5 Metc.) 587, 588 it was held that "inhabitant" as used in the original constitution is identical in meaning and synonymous with "citizen who has resided," as expressed in the amendment. These provisions and construction are the best possible means of determining the exact use made of the term at that time. Some of the men who were in the National Constitutional Convention were members of the State conventions that placed in the documents themselves this definition of "inhabitant."

On the 8th of August, 1787, in the Constitutional Convention, the committee of detail struck out of the text at this place the word "resident" and substituted the word "inhabitant." The motion was made by Mr. Sherman and seconded by Mr. Madison, who thought the latter less vague, and would permit absence for a considerable time on public or private business without disqualification. They were trying to get away from the abuse being made of the loose construction of "resident" by personal enemies of those who sought to qualify. There is no suggestion of an uncommon meaning to be given the word in their use of it here. The construction placed on these statements of Mr. Madison and others by Mr. Beck is to apply it to his case wherein he was absent from Pennsylvania 23 years, under his own admission, and yet he would not be disqualified on the grounds of inhabitancy. (Rec. p. 15.) And this regardless of the fact that during that time he had been an inhabitant of New York, New Jersey, and the District of Columbia, and had voted in both these States, and still has his only true home in Washington. Nothing was further from the thoughts of these great men.

Mr. James Wilson preferred "inhabitant" to "resident". Statements made by him and Mr. Sherman at other stages of the debates prove conclusively that they would not countenance a provision to permit representation by one who had not had his actual habitation among his constituents for such a long time. The brilliant James Wilson, when insisting on election of the Members of the House by the people, as shown in Formation of the Union, page 755, said:

> Mr. Wilson is of the opinion that the national legislative powers ought to flow immediately from the people, so as to contain all their understanding and to be an exact transcript of their minds.

Mr. Sherman, in advocating annual election of Members of the House, said:

> Mr. Sherman thought Representatives should return home and mix with the people. By remaining at the seat of government they would acquire the habits of the place which might differ from those of their constituents. So he preferred annual elections. (Formation of the Union, p. 256.)

> Mr. SHERMAN. I am for one year. Our people are accustomed to annual elections. Should the Members have a longer duration of service, and remain at the seat of government, they may forget their constituents, and perhaps imbibe the interest of the State in which they reside, or there may be danger of catching the esprit de corps. (Formation of the Union, p. 794.)

And this from the man who moved to substitute "inhabitant" for "resident." He was unwilling that a man should stay more than a year at the seat of government before giving an account of his convictions to his people.

In placing this limitation on qualifications for membership in the House it was an attempt on their part to preserve the coloring of local State convictions, State feelings, which might be lost if men with attachments to other locations and other conditions were permitted to sit for them; that otherwise they feared attachments for State governments, would be lost to the General Government, and usurpation of powers by the latter encouraged. No fear was ever better founded or more completely borne out by the present trend toward centralization.

In Story on the Constitution, Volume I, article 619, he says:

> The object of this clause, doubtless, was to secure an attachment to, and a just representation of, the interests of the State in the national councils. It was supposed that an inhabitant would feel a deeper concern and possess a more enlightened view of the various interests of his constituents than a mere stranger. And, at all events, he would generally possess more entirely their sympathy and confidence.

In Constitution of the United States, by John Randolph Tucker, Volume I, pages 394, 395, we find:

> This inhabitancy or domicile of the person in the State which chooses him was to exclude all who, by noninhabitancy, might secure an election when by reason of no community of interest, with the constituency, he would be unfitted to represent it.

There was the purpose, no doubt, as shown by the committee discussion, to guard against corruption by the wealthy who might hunt for a district to purchase. But the very foundation of representative government, to their minds, rested on their ability to insure a true reflection of local sentiment in the most numerous legislative branch. They sought to make the House a cross section of national thought, of national aspirations, of national feelings. They will that their Government should always have a common interest with the people, and be administered for their good, be responsive to their will; so it was essential to their rights and liberties that the Members of the House should have an immediate instruction from and sympathy with the people. Hence the reasonableness of the provision that a person, to become a Representative must have a bona fide and permanent abode, and actually live among his future constituents. No habitual nonresident is eligible.

The leading case directly in point is that of John Bailey, of Massachusetts, decided in the Eighteenth Congress, as shown in Hinds' Precedents, Volume I, page 419.

On October 1, 1817, Mr. Bailey was appointed a clerk in the State Department from his father's home in Massachusetts, and held said position for six years. During that time he lived in Washington in hotels, until a year before his election in September, 1923, at which time he married in Washington and moved into the home of his wife's mother. He had made occasional visits back to Massachusetts, had his library there, claimed his father's home as his habitation, declared his stay in Washington temporary, and that his real habitation was Massachusetts.

In the report adopted in that case Annals of Congress, volume 41, page 1594, a full discussion and interpretation of the word "inhabitant" is given. It is set forth that the word was substituted for "resident" as being a "stronger" term, intended to express more clearly their intention that the persons to be elected should be completely identified with the State in which they were to be chosen. Because of the importance of this case, we quote extensively from the report as follows:

I

> "The difficulty attending the interpretation of constitutional provisions, which depend on the construction of a particular word, renders it necessary to complete explication, to obtain, if possible, a knowledge of the reasons which influenced the framers of the Constitution in the adoption and use of the word 'inhabitant,' and to make an endeavor at ascertaining, as far as practicable, whether they intended it to apply, according to its common acceptation, to the persons whose abode, living, ordinary habitation, or home should be within the state in which they should be chosen, or, on the contrary, according to some uncommon or technical meaning."

II

> "The true theory of the representative Government is bottomed on the principle that public opinion is to direct the legislation of the country, subject to the provisions of the Constitution, and the most effectual means of securing a due regard to the public interest, and a proper solicitude to relieve the public inconveniences is to have the Representative selected from the bosom of that society which is composed of his constituents. A knowledge of the character of the people for whom one is called to act is truly necessary, as well as of the views which they entertain of public affairs. This can only be acquired by mingling in their company and joining in their conversations; but above all, that reciprocity of feeling and identity of interest, so necessary to relations of this kind, and which operate as a mutual guaranty between the par-

ties, can only exist, in their full extent, among members of the same community.

"All these reasons conspire to render it absolutely necessary that every well-regulated government should have, in its constitution, a provision which should embrace those advantages, and there can be no doubt it was from considerations of this kind that that convention wisely determined to insert in the Constitution that provision which declares no person shall be a Member of either House of Congress, 'who shall not, at the time of the election, be an inhabitant of that State in which he shall be chosen,' meaning thereby that they should be bona fide members of the State, subject to all the requisitions of its laws and entitled to all the privileges and advantages which they confer. That this subject occupied the particular attention of the convention and that the word 'inhabitant' was not introduced without due consideration and discussion is evident from the journals, by which it appears that, in the draft of a constitution reported by the committee of five, on the 6th of August, the word 'resident' was contained, and that, on the 8th of that same month, the convention amended that report by striking out 'resident,' and inserting 'inhabitant,' as a stronger term, intended more clearly to express their intention that the persons to be elected should be completely identified with the State in which they were to be chosen. Having examined the case, in connection with the probable reasons which influenced the minds of the members of the convention and led to the use of the word 'inhabitant' in the Constitution, in relation to Senators and Representatives in Congress, it may not be improper, before an attempt is made at a further definition of the word, a little to consider that of citizen, with the view of showing that many of the misconceptions in respect to the former have arisen from confounding it with the latter.

"The word 'inhabitant' comprehends a simple fact, locality of existence; that of 'citizen' a combination of civil privileges, some of which may be enjoyed in any of the States in the Union. The word 'citizen' may properly be construed to mean a member of a political society; and although he might be absent for years and cease to be an inhabitant of its territory, his rights of citizenship may not be thereby forfeited, but may be resumed whenever he may choose to return; or, indeed, such of them as are not interdicted by the requisition of inhabitancy, may be considered as reserved; as, for instance, in many of the States a person who, by reason of absence, would not be eligible to a seat in the legislature, might be appointed a judge of any of their courts. The reason of this is obvious. The judges are clothed with no discretionary powers about which the public opinion is necessary to be consulted; they are not makers but expounders of the law, and the constitution and statutes of the State are the only authorities they have to consult and obey."

III

> "If citizenship in one part of the Union was only to be acquired by a formal renunciation of allegiance to the State from which the person came, previous to his being admitted to the rights of citizenship in the State to which he had removed, the expression of an intention to return would be of importance; but, as it is, it can have no bearing on the case; the doctrine is not applicable to citizens of this confederacy removing from one State and settling in another; nor can it, in the present case, be considered as going to establish inhabitancy in Massachusetts when the fact is conceded that, at the time of the election, and for nearly six years before, Mr. Bailey was actually an inhabitant of the city of Washington, in the District of Columbia, and, by the charter of the city, and the laws in force in the District, was, to all intents and purposes, as much an inhabitant thereof as though he had been born and resided there during the whole period of his life; and the refusal to exercise the rights of a citizen can be of no consequence in the case. It is not the exercise of privileges that constitutes a citizen; it is being a citizen that gives the title to those privileges."

If the former action of the House is to have any weight with us now, this Bailey decision definitely disposes of the major contention that a political status is the answer to inhabitancy. Mr. Madison was then alive and vigorous, and no doubt watched with interest every interpretation of the Constitution. Had this decision done any violence to the intention of the framers, it would have been his nature to protest. But no comment from him can be found. And no holding of the House has ever reversed or modified the principles of interpretation established in this report.

It is apparent that temporary absence from a regular habitation on private or official business does not disqualify under this clause. The same committee which reported the Bailey case, and at the same session, in the Forsyth case, so held. But the presence of Mr. Beck in his home in Washington can not stand on that exception. He purchased his home here and moved into it from a full citizenship of the State of New York some seven months before he became connected with a Government position. He remained an inhabitant of the District of Columbia from June, 1925, until July, 1926, with no official connection whatsoever, before he rented the apartment in Philadelphia. And in this connection let it be denied, as charged by him, that almost one-half the Senate and a large number of the House who have homes here are in a similar position to his.

The Members of Congress referred to, when elected, were bona fide inhabitants of their respective States. Any home established here for their use is incident to the discharge of public duty, temporary, and does not destroy the status of inhabitancy they had when elected. He seeks to reverse that order by having his real habitation in Washington to begin with and attempting to create a fictitious abode in the State of Pennsylvania for the purposes of qualification and not as an incident to service after election. There is no

such wholesale condition of noninhabitancy prevailing, but if such were the case the House would have all the more reason to check a flagrant violation of the Constitution.

His former residence in Pennsylvania can not enter into this consideration for the reason that, at least for 23 years, he was completely severed and divorced from that State so far as any pretense to habitation or voting privilege or citizenship is concerned. He divested himself of every privilege of citizenship in Pennsylvania to avail himself of the superior advantages he would have in moving to New York. His claim must stand or fall on the facts developing after July, 1926. It will be observed from the record that Mr. Beck had but little to do personally with the effort to qualify him under the State law for voting. Undoubtedly he did not even familiarize himself with the legal requirements for voting. While he was in Europe and two months before he rented any apartment, he was entered on the assessment roll for a voting tax out of the regular order and of date exactly six months before the November election, the time required for returning to citizenship in that State. He never regarded this assessment enough to pay the 25-cent tax. He did not run for Congress that year because he did not get the endorsement of the Vare organization. A brother-in-law of Mr. Vare was nominated and elected.

The question then arose as to the legality of the election of Mr. Vare to the Senate and his right to a seat therein, and Mr. Beck because of counsel for him. He was assessed in the semiannual assessment for 1926 and again ignored it. Twice in 1927 Mr. Beck's name was placed on the assessors' list, once out of regular order which assessment was again ignored by him, and Mr. Vare's office procured the only tax receipt of any kind he has purchased in that State, 25 cents each for him and Mrs. Beck and delivered it to him in said office. He registered the next day and voted in the primary 10 days later, in which the Member of Congress from that district was nominated for a city office and immediately resigned his seat.

Thereupon the Vare organization, through Mr. Vare's secretary, notified Mr. Beck that he would be nominated for Congress at a certain time, and for him to be in waiting. He was called for at the designated time, conducted to a hall, and was formally notified of and accepted the nomination from the seven men present, who had nominated him, two of whom he states he knows. He made no canvass whatever in this district for the purpose of developing sentiment in his favor or for expressing his views on national issues.

Mr. Beck only made three speeches in Philadelphia in the city-wide campaign, in November, 1927, general election, at which time he was elected, all on Friday or Saturday next before the election on Tuesday, and then left immediately for his Washington home. He did not vote in the said election the following Tuesday for the reason that he was at home, and not in Pennsylvania. He had entertained anxiety that an adverse city election for the Vare ticket would be construed as a repudiation of his client, and his speeches had been made in an effort to avert this.

In a day when a political machine can select any individual it chooses to put into the House, there are multiplied dangers to those the fathers knew

when they made this inhibition. Without reflecting in the least on the personal desirability of Mr. Beck, it is clear that, if his contention is to prevail, an all-powerful, though it be an unscrupulous, combine in control of a district machine can select anyone they need for any special purpose, and the House would be powerless to resist it. All that would be required of their choice would be to establish what can be termed a technical, constructive, fictitious, superficial, fly-by-night residence and then go a-carpetbagging. This presages a radical and serious departure from the fundamentals of representative government as we know it.

This is not a case of simply thwarting the will of a constituency. We consider that any constituency should have the right of choice, but that choice must be within constitutional bounds. Our charter of liberties, the Constitution, should stand above the aspirations of an individual who would subvert it or the action of constituencies who ignore it. If Mr. Beck is to retain his seat we view the precedent, not as a part of the general "erosion" of the Constitution, but as a frontal attack on it, a blasting process which is to weaken the foundation of the great American dream of representative government.

Privileged resolution (H. Res. 283) agreed to by voice vote after extended debate and after defeat (78 yeas to 247 nays with 3 "present" of substitute declaring Member not entitled to a seat [70 CONG. REC. 1351. 70th Cong. 2d Sess., Jan. 8, 1929; H. Jour. 98].

**§ 6.5 Taylor v England, 6th Congressional District of West Virginia.**

*Pleadings.*—Filing of brief by contestant after the legal time with consent of contestee was permitted by an elections committee.

*State election law* requiring rejection of ballots not signed by election officials was held not binding on the House where voter intent was clear.

*Ballots,* rejected by election officials as not signed, were not counted where contestant failed to sustain his allegations that the election result would be changed.

*Returns* were not partially rejected where both parties failed to sustain allegations of fraud with sufficient evidence.

Report for contestee, who retained his seat.

Report of Committee on Elections No. 3 submitted by Mr. Charles L. Gifford, of Massachusetts, on Apr. 9, 1928, follows:

Report No. 1181

CONTESTED ELECTION CASE, TAYLOR V ENGLAND

STATEMENT OF THE CASE

On the 2d of November, 1926, a congressional election was held in the sixth district of West Virginia, the nominees being Hon. E. T. England, on the Republican ticket, and Hon. J. Alfred Taylor, on the Democratic ticket.

When the returns from the various precincts had been certified, the State officials canvassed the returns and issued a certificate of election to Hon. E. T. England, the incumbent, based on the following:

| | *Votes* |
|---|---|
| Mr. England | 45,898 |
| Mr. Taylor | 45,681 |
| Majority given to Mr. England by the election officials | 217 |

On the 26th day of January, 1927, the contestant, J. Alfred Taylor, served notice of contest upon the contestee, E. T. England, setting forth certain grounds of contest, the two upon which he later elected to rely being briefly summarized as follows:

> (*a*) That several hundred ballots were cast which did not bear the signature of the clerks of election written in the manner prescribed by the West Virginia statute governing election procedure and which the election officials refused to canvass, tabulate, or count, although said ballots expressed the clear intent of the voter and consequently should have been counted, his contention being that if the ballots so rejected were to be counted they would give him a majority of the votes cast.
>
> (*b*) That fraud was exercised by the proponents of the contestee in precinct No. 27, known as the Triangle precinct, and that all the votes cast in said precinct, which gave a majority therein of 385 for the contestee, should be rejected.

On the 12th day of February, 1927, the contestee's answer and counternotice of contest was served upon the contestant, J. Alfred Taylor.

Evidence was taken by depositions, the contestee's brief was filed on the 31st of December, 1927, and thereafter, to wit, on the 10th day of February, 1928, the contestant filed his reply brief, said brief being submitted after the expiration of the 30-day period prescribed for the filing thereof, but being accepted by your committee with the consent of the contestee.

### PROCEEDINGS OF THE COMMITTEE

The testimony in the case having been printed and the same, together with the printed briefs of both parties to the contest having been transmitted to the committee, a public hearing was given the parties on the 9th day of March, 1928, at which time oral arguments were presented by the contestant, Hon. J. Alfred Taylor and his counsel, John H. Connaughton, esq., and by Charles Ritchie, esq., counsel for the contestee, Hon. E. T. England, said arguments being likewise printed and made a part of the records of the contest.

On the 4th day of April, 1928, your committee met for further consideration of the case and it was the unanimous conclusion thereof that-

I. The House of Representatives should not consider itself obligated to follow the drastic statute of the State of West Virginia, under the provisions of which all ballots not personally signed by the clerks of election in strict compliance with the manner prescribed had been rejected, but should retain the discretionary right to follow the rule of endeavoring to discover the clear intent of the voter. However, your committee further found that the contestant had not substantiated his allegation that if all the votes which had been rejected by the election officials on the ground stated were to be counted the result would be a majority in his favor.

II. That neither the contestant nor the contestee had presented sufficient evidence to establish their mutual contentions that fraud had been practiced in various precincts, including the so-called Triangle precinct, the rejection of the votes cast in which would have been necessary if the contestant were to prevail, and that no votes should be thrown out because of fraud.

CONCLUSION

Your committee unanimously finds, therefore, that the contestant has not sustained the contentions which were the basis of his contest and begs to submit for adoption the following resolution:

> *Resolved,* That E. T. England was duly elected a Representative from the sixth district of West Virginia to the Seventieth Congress, and is entitled to his seat therein.

Privileged resolution (H. Res. 161) agreed to by voice vote without debate [69 CONG. REC. 6298, 70th Cong. 1st Sess., Apr. 12, 1928; H. Jour. 670].

## § 7. Seventy-first Congress, 1929–31

### § 7.1 Wurzbach v McCloskey, 14th Congressional District of Texas.

*Returns* were examined by an elections committee upon adoption by the House of a privileged resolution authorizing subpena of returns and election officials.

*Fraud* sufficient to change the election result was admitted by contestee during pleadings.

Summary report for contestant, who was seated; contestee was unseated.

On Jan. 7, 1930, Mr. Willis G. Sears, of Nebraska, offered as privileged by direction of the Committee on Elections No. 3 the following resolution:

*Resolved,* That Jack R. Burke, county clerk, or one of his deputies, Perry Robertson, county judge, or one of his deputies, and Lamar Seeligson, district attorney all of Bexar County, State of Texas, are hereby ordered to appear before Elections Committee No. 3, of the House of Representatives as required then and there to testify before said committee in the contested-

election case of Harry M. Wurzbach, contestant, versus Augustus McCloskey, contestee, now pending before said committee for investigation and report; and that said county clerk or his deputy, said county judge or his deputy, and said district attorney bring with them all the election returns they and each of them have in their custody, control, or/and possession, returned in the said county of Bexar, Tex., at the general election held on November 6, 1928, and that said county clerk also bring with him the election record book for the said county of Bexar, Tex., showing the record of returns made in the congressional election for the fourteenth congressional district of Texas, for the said general election held on November 6, 1928, and to that end that the proper subpoenas be issued to the Sergeant at Arms of this House commanding him to summon all of said witnesses, and that said county clerk, said county judge, and said district attorney to appear with said election returns, as witnesses in said case, and said county clerk with said election record book; and that the expense of said witnesses and all other expenses under this resolution shall be paid out of the contingent fund of the House; and that said committee be, and hereby is, empowered to send for all other persons or papers as it may find necessary for the proper determination of said controversy.

The resolution (H. Res. 113) was agreed to by voice vote after a response by the Speaker that the resolution was privileged [72 CONG. REC. 1187, 71st Cong. 2d Sess., Jan. 7, 1930; H. Jour. 117].

Report of Committee on Elections No. 3 submitted by Mr. Willis G. Sears, of Nebraska, on Feb. 10, 1930, follows:

Report No. 648

CONTESTED ELECTION CASE, WURZBACH v MCCLOSKEY

[To accompany H. Res. 149]

*To the Speaker and the House of Representatives:*

Your committee begs leave to report, that after a full hearing, we find that Harry M. Wurzbach, contestant, is entitled to be seated as Member of the House of Representatives, from the Fourteenth congressional district of Texas, and that Augustus McCloskey is not entitled to retain his seat in said body.

Subsequently, the following privileged resolution (H. Res. 149) was agreed to after debate by voice vote [72 CONG. REC. 3383, 71st Cong. 2d Sess., Feb. 10, 1930; H. Jour. 249]:

*Resolved,* That Augustus McCloskey was not elected as Representative in the Seventy-first Congress from the fourteenth congressional district of Texas, and is not entitled to a seat as such Representative.

*Resolved,* That Harry M. Wurzbach was elected as a Representative in the Seventy-first Congress from the fourteenth district in the State of Texas and is entitled to his seat as such Representative.

**§ 7.2 Lawson v Owen, 4th Congressional District of Florida.**

*Contestant,* an unsuccessful candidate in the general election, was held not entitled to a seat where ballots cast for contestee with questionable qualifications were not clearly void.

*Qualifications of Member.*—The seven-years' U.S. citizenship requirement was held fulfilled in the case of a woman Member-elect, who had forfeited her citizenship by marriage to a foreign alien and who had later been naturalized less than seven years before the election.

The majority of an elections committee held that cumulative years of citizenship satisfied the seven-year requirement of the U.S. Constitution.

A minority of an elections committee construed the "Cable Act" to reestablish contestee's required consecutive years of citizenship.

Report for contestee, who retained her seat.

Report of Committee on Elections No. 1 submitted by Mr. Carroll L. Beedy, of Maine, on Mar. 24, 1930, follows:

Report No. 968

CONTESTED ELECTION CASE, LAWSON V OWEN

The Committee on Elections No. 1, having had under consideration the right of Mrs. Ruth Bryan Owen to her seat as a Representative in the Seventy-first Congress from the fourth congressional district of Florida, as submitted, the said committee, after consideration of the same, respectfully submits this report to the House of Representatives.

THE QUESTION INVOLVED

The question involved is whether Mrs. Ruth Bryan Owen on the 6th day of November, 1928, on which date an election of a Representative to the Federal House of Representatives from the fourth congressional district of the State of Florida was held in said district and State, had been seven years a citizen of the United States as required by, and within the meaning of, paragraph 2 of section 2, Article I, of the Constitution of the United States.

It was contended by the contestant, William C. Lawson, that Ruth Bryan Owen had not been seven years a citizen of the United States next preceding the said election, and that such a period of citizenship must have next preceded the election in order to meet the qualifications for a Representative to the House of Representatives, as set forth in paragraph 2 of section 2, Article I of the Constitution; that he, the said William C. Lawson, being more than 25 years of age, and having been an American citizen for seven years next preceding such election, was duly qualified to sit in the House of Representatives as a Representative from the fourth congressional district of Florida for the following reasons:

1. That in the aforesaid election of November 6, 1928, he, William C. Lawson, received 36,288 duly qualified votes as a candidate for Representative in the House of Representatives from the fourth congressional district of Florida.

2. That Ruth Bryan Owen at said election on the 6th day of November, 1928, although receiving 67,130 votes, had not been for seven years next preceding the said election a citizen of the United States, was not eligible or qualified for membership in the House of Representatives, and that said votes so purporting to be cast for her were a nullity.

3. That said William C. Lawson being duly eligible and qualified to membership in the House of Representatives, received all the votes cast for a candidate who was eligible and qualified to be a Representative in the House of Representatives from the fourth congressional district of Florida and should, therefore, be declared the only duly elected and qualified Member of the House of Representatives from the said congressional district.

There was no charge by the contestant of any fraud in the election in question, and the eligibility of Ruth Bryan Owen revolved upon the issue as to whether she had been an American citizen for seven years within the meaning of paragraph 2 of section 2, Article I of the Federal Constitution.

THE FACTS

The contestee, Ruth Bryan Owen, was born in Jacksonville, III., United States of America, on October 2, 1885, and resided in the United States of America until her marriage on May 3, 1910, to Reginald Altham Owen, a British subject. On the day of her marriage, she left the United States with her husband and resided in England with him for approximately the next 10 years. On May 30, 1919, she returned to the United States with her husband, and on the 1st day of September, 1919, both Mr. and Mrs. Owen made their home in Florida where they resided until the death of Mr. Owen which occurred on December 12, 1927. Mrs. Owen still continues to reside in Florida.

On the 23d day of January, 1925, Mrs. Ruth Bryan Owen petitioned the United States Federal Court for the Southern District of Florida for naturalization, and on the 27th day of April, 1925, she was duly declared a naturalized American citizen by Judge Rhydon M. Call, the duly constituted judge of such court. A certificate of naturalization was duly issued to Mrs. Owen on the said 27th day of April, 1925.

Mrs. Ruth Bryan Owen was a candidate on the Democratic ticket for election to the office of Representative in Congress from the fourth congressional district of Florida in the election duly held on the 6th day of November, 1928. In that election it is conceded that 67,130 votes were cast for her by duly qualified voters of her district, and in an election legally held. In the same election 36,288 votes were cast by duly qualified voters in the said district for William C. Lawson, who ran on the Republican ticket as a candidate for election to the office of Representative in Congress from the fourth congressional district of Florida.

THE CONSTITUTIONAL PROVISION AND FEDERAL LAWS AFFECTING THE CASE

Paragraph 2 of section 2, Article I of the Constitution reads as follows:

> No person shall be a Representative who shall not have attained to the age of 25 years, and been 7 years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Paragraph 1, section 3 of the Federal expatriation act of March 2, 1907, reads as follows:

> That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

The so-called Cable Act of September 22, 1922, reads as follows:

> That the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.
>
> Sec. 2. That any woman who marries a citizen of the United States after the passage of this act, or any woman whose husband is naturalized after the passage of this act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions: (a) No declaration of intention shall be required; (b) in lieu of the 5-year period of residence within the United States and the 1-year period of residence within the State or Territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Puerto Rico for at least one year immediately preceding the filing of the petition.
>
> Sec. 3. *That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: Provided,* That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter

be subject to the same presumption as is a naturalized citizen of the United States under the second paragraph of section 2 of the act entitled "An act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907. *Nothing herein shall be construed to repeal or amend the provisions of Revised Statutes 1999 or of section 2 of the expatriation act of 1907 with reference to expatriation.*

Sec. 4. That a woman who, before the passage of this act, has lost her United States citizenship by reason of her marriage to an alien eligible for citizenship, may be naturalized as provided by section 2 of this act: *Provided*, That no certificate of arrival shall be required to be filed with her petition if during the continuance of the marital status she shall have resided within the United States. *After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this act.*

Sec. 5. That no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status.

Sec. 6. That section 1994 of the Revised Statutes and section 4 of the expatriation act of 1907 are repealed. Such repeal shall not terminate citizenship acquired or retained under either of such sections nor restore citizenship lost under section 4 of the expatriation act of 1907.

Sec. 7. *That section S of the expatriation act of 1907 is repealed. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section.* A woman who has resumed under such section citizenship lost by marriage shall upon the passage of this act, have for all purposes the same citizenship status as immediately preceding her marriage.

Note.—The italics in the foregoing act are the committee's.

It was contended by the contestant, William C. Lawson, that although Mrs. Owen was born an American citizen and resided here as such until May 3, 1910 (a period of 24 years and 7 months) that under the provisions of the expatriation act of Congress of March 2, 1907, she lost her citizenship through her marriage to a British subject. It is also contended that although she was admitted to American citizenship on April 27, 1925, through naturalization proceedings under the terms of the Cable Act of September 22, 1922, that nevertheless on the date of her alleged election to Congress on November 6, 1928, she had been an American citizen next preceding said election for a period of only 3 years, 6 months, and 9 days. It was argued that although in the present instance Mrs. Owen is, and always has been, loyal to and familiar with our American system of Government and American institutions, yet a term of seven years' citizenship next preceding the date of a Federal election must be insisted upon in all cases in accordance with the alleged intent of the drafters of the Constitution, to insure proper

qualification in all cases, and to protect us against foreign influence in the Federal Congress.

It was pointed out by contestant's counsel that if the citizenship requirements of the Federal Constitution, as set forth in paragraph 2 of section 2, Article I of the Constitution, were to be construed as cumulative and Mrs. Owen's term of American citizenship prior to her marriage were to be added to her term of citizenship subsequent to her naturalization, a dangerous precedent would be established and the true intent of the constitutional requirement in question would be subverted.

The contestant thereupon asked the committee to conclude that inasmuch as Mrs. Owen was not a legally qualified candidate for election to the House of Representatives in accordance with the requirements of the Federal Constitution, all the votes cast for her were a nullity, and that William C. Lawson, the contestant, being a duly qualified candidate for election to the House of Representatives in all respects, was by virtue of the 36,288 votes cast for him under date of November 6, 1928, the only representative from the fourth congressional district of Florida legally entitled to a seat in the House of Representatives.

To substantiate his contention in this behalf, the contestant submitted, among others, the following cases to the committee: State *v.* Frear (144 Wis. 79), Gulick *v.* New (14 Ind. 93); State *v.* Bell (160 Ind. 61); Hoy *v.* State (168 Ind. 506).

An examination of all the precedents cited by counsel for the contestant reveals the fact that knowledge brought home to the voters respecting the ineligibility of candidates for office and for which candidates they voted despite their knowledge of ineligibility, are limited to cases involving ineligibility based on a palpable physical fact or on an established legal fact.

The Wisconsin case of State v. Frear embraced the following facts: In a primary election and after the ballots therefor had been printed, a candidate for the nomination as attorney general was drowned. The fact of his death was widely published in letters, telegrams, and newspapers throughout the State. Voters were urged to cast their ballots for the deceased candidate on the ground that the State central committee could fill the vacancy if he (the deceased candidate) received the plurality of votes in the primary election. The court rightly held that votes cast for a deceased person by voters who knew of his decease, must be regarded as so much blank paper.

In this Wisconsin case, there was no question as to the death of one of the candidates for attorney general. His death was a generally known and physical fact. It involved no question, which under the Constitution and the law, must be decided by that branch of the Government legally authorized to pass upon the issue before the fact itself could be established. The Frear case and others cited are unquestionably good authority for the conclusion that even when a majority of voters cast their votes for a person who can not in any event take office, all votes so cast should be considered a nullity—this on the theory that an election is held for the purpose of electing a candidate to office, and not for the purpose of creating a vacancy. As counsel for the contestant, William C. Lawson, stated, referring to English cases which were not cited:

> If a vote for a man known by the voter to be "dead" can be counted, then "a vote for a stick or stone" or for "the man in the moon" should also be counted.

The committee agrees with counsel for the contestant that the case of State v. Frear and other cases cited in connection therewith are good authority for the proposition that where the ineligibility of a candidate is an established and unquestioned fact, and voters who with knowledge, willfully insist upon voting for a candidate physically or legally dead, they should lose their votes and that the remaining candidate, although receiving only a minority of the votes cast, is in fact elected.

It is the judgment of the committee that the above cases are not applicable to the case of Mrs. Ruth Bryan Owen. The question of her citizenship and her incidental eligibility or ineligibility was a highly disputable question. It was not an established physical or legal fact. True, Mrs. Owen had sought the opinion of some of the leading law firms in Florida when she was a candidate for the nomination as Representative to Congress from the fourth congressional district of Florida in the 1926 primaries. These legal opinions supporting her eligibility were reduced to a written statement over the signatures of the various lawyers consulted. The statement was later printed and freely circulated in the district in question during the primary campaign of 1926. However, it did not reduce the question to a settled fact.

Indeed Mrs. Owen's opponents took the opposite view respecting her eligibility not only in the primary campaign of 1926, but also in the primary campaign and the ensuing elections of 1928. Press statements as to her eligibility were freely discussed and circulated, and the question of her citizenship was conceded by both candidates to have been in issue not only in her primary campaign of 1926, but in the primary campaign and the ensuing elections of 1928.

Neither Mrs. Owen's attorneys nor the people of Florida had authority to determine the question of citizenship involved. Her citizenship status was defined by provisions both of the Federal Constitution and of the Federal laws open to various constructions. The power to settle the disputed question as to the citizenship status of Mrs. Owen rests solely with the House of Representatives which, under the provisions of paragraph 1 of section 5, Article I of the Federal Constitution:

> shall be the judge of the elections, returns, and qualifications of its own members.

Not through any exercise of the right of suffrage by the people of Florida, but only through action by the Federal Congress is the citizenship status of Mrs. Owen to be removed from the realm of mere contention and established in fact.

Your committee, therefore, concludes inasmuch as the voters of the fourth congressional district of Florida cast a majority of votes for Mrs. Owen in an election legally held, not in the face of an established fact of ineligibility but rather in the face of an opponent's contention as to ineligibility, that their votes were not thrown away. It is the view of your committee that the

majority vote in question expressed a preference for Mrs. Owen, who was physically able to take a seat in the House of Representatives, and who could not legally be precluded therefrom except by action of the House of Representatives.

Your committee proceeds from this conclusion to the next question involved as to whether Mrs. Ruth Bryan Owen had on November 6, 1928, been seven years a citizen of the United States within the meaning of the Federal Constitution, as set forth in paragraph 2 of section 2, Article I.

By a unanimous vote, your committee concludes that Mrs. Owen measures up to the requirements of the Constitution as to seven years' citizenship. Five members of the committee, namely, Representatives Letts, Goodwin, Kading, Newhall, and Johnston, arrive at their conclusion through a consideration of the constitutional provision alone. They believe that the 7-year period of citizenship is cumulative; that it was not the intent of the framers of the Constitution, and that it is not now to be construed as meaning that the seven years' citizenship qualification for a Representative in the House of Representatives is to be limited to the seven years next preceding the date of election.

They take the position that in construing any section of the Constitution, the ordinary meaning should be ascribed to its language and that when that meaning is apparent on the face of the instrument, the language used must be accepted both by legislatures and by courts, without adding to it or taking from it. Their view is that if the framers had intended the seven years' citizenship to have been limited to the seven years next preceding an election, they would have said so. Their final conclusion is that inasmuch as Mrs. Ruth Bryan Owen had been a citizen of the United States for 24 years and 7 months prior to her marriage, and for 3 years and 6 months subsequent to her naturalization, she enjoyed an American citizenship extending over a period of 28 years and 1 month, and is, therefore, eligible to a seat in the Federal House of Representatives.

The four remaining members of the committee, namely, Representatives Beedy, Esliek, Hall, and Clark, base their conclusion upon another line of reasoning. They reason that the 7-year period of citizenship required of eligibles to a seat in the House of Representatives must be construed as meaning seven years next preceding the date of election. Their view is that while Mrs. Owen lost her American citizenship under the expatriation act of March 2, 1907, by her marriage to an alien on May 3, 1910, she nevertheless regained her American citizenship through naturalization under the terms of the Cable Act of September 22, 1922. They concede that the Cable Act was not retroactive in the sense that its enactment, though it expressly repealed section 3 of the expatriation act of 1907, restored lost citizenship.

Their view is that the Federal Congress which had the power to deprive Mrs. Owen of her American citizenship under the expatriation act of 1907, also had the power to pass a law which set out the procedure by means of which she could recover her American citizenship. This she did when she became a naturalized American citizen under the provisions of section 2 of the Cable Act. They hold that though Mrs. Owen lost her United States citizenship under the expatriation act of 1907 by reason of her marriage to an

alien, she nevertheless regained it under the Cable Act which, in the concluding sentence of section 3, declares that:

> after her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this act.

That status, say those of the committee who insist upon a 7-year period of American citizenship next preceding the election, is clearly set forth in the first sentence of section 3 of the Cable Act, which declares that:

> a woman citizen of the United States *shall not cease to be a citizen of the United States* by reason of her marriage after the passage of this act . . . .

They hold that the Cable Act passed subsequent to the adoption of the nineteenth amendment, which gave the ballot to the American women, should be viewed in the light of that amendment as but another step in extending the rights and privileges of American women. Their view is that it should be liberally construed as a measure intended to right an injustice done American women by the act of 1907, and to place her upon an equality with American men who never lost their American citizenship through marriage with an alien.

Their conclusion is that Mrs. Ruth Bryan Owen, through naturalization, enjoys the same status as an American woman who marries an alien subsequent to the passage of the Cable Act, namely, the status of one who never loses her citizenship. In the terms of the Cable Act itself, hers is the status of a woman who:

> does not cease to be a citizen of the United States by reason of her marriage.

It is, therefore, the unanimous conclusions of your committee that Ruth Bryan Owen meets the requirements of one eligible to a seat in the House of Representatives, as set forth in paragraph 2 of section 2, Article I of the Constitution.

For the above reasons, the committee unanimously recommends the adoption of the following resolutions (H. Res. 241):

> *Resolved,* That William C. Lawson was not elected a Representative to the Seventy-first Congress from the fourth congressional district of the State of Florida and is not entitled to a seat therein.
>
> *Resolved,* That Ruth Bryan Owen was duly elected a Representative to the Seventy-first Congress from the fourth congressional district of the State of Florida and is entitled to retain her seat therein.

ADDITIONAL MAJORITY VIEWS

The undersigned members of the committee, constituting a majority thereof, feel that they may very properly amplify the report of the chairman by setting out the reasoning which leads them to their conclusion.

It is to be regretted that the committee is not in harmony upon the constitutional question involved. That question far outweighs the consideration personal to Mrs. Owen, which is unanimously reached by the committee.

The majority would concede that Mrs. Owen comes within the letter and the spirit of the constitutional provision which requires that she shall have been seven years a citizen of the United States. The minority hold that she was not so qualified to be a candidate for a seat in the House of Representatives because they conclude that the seven years' citizenship required must have been the seven years next preceding the election at which she was chosen to represent her Florida district.

The minority think that her naturalization under the Cable Act restored the citizenship which she had lost through expatriation by her marriage to a British subject in 1910. They resort to the last sentence in section 4 of the Cable Act, which provides: "After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this act." They construe this provision of the law to restore to her the American citizenship which under the expatriation act was lost to her from the date of her marriage to a British subject until the date of her naturalization in 1925. It is evident that less than seven years intervened between her naturalization in 1925 and her election in 1928. The minority contend that her naturalization under the Cable Act had the effect of obliterating the citizenship which she enjoyed or resented as a British subject from 1910 to 1925 and, in effect, hold that by virtue of her naturalization under the Cable Act she has always been an American citizen.

The majority say that the language of the Cable Act above quoted only establishes her citizenship status after the date of her naturalization. This seems to be the clear meaning of the provision, if the words and language employed be given ordinarily accepted meaning. If this reasoning is not conclusive, the majority think that the language of section 7 of the Cable Act is not susceptible of misinterpretation. That section provides in specific language for the repeal of section 3 of the expatriation act and, in language just as definite and specific, settles the question here in dispute. It provides: "Such repeal shall not restore citizenship lost under such section. . . ."

To give the constitutional provision the construction asked by the minority and to give the Cable Act the meaning ascribed to it by such minority is to present an inconsistency. They give the constitutional provision a strict interpretation, saying in effect that Mrs. Owen is ineligible unless she was a citizen for the seven years next preceding her election. They admit she did not enjoy American citizenship during such seven years. They would, however, allow Congress to contravene this constitutional requirement and supplement her citizenship of less than four years, extending from 1925 to 1928, by ascribing American citizenship to her during the period of her expatriation.

The majority say that the legal fiction may not be indulged. It is contrary to considerations of public policy, logic, and reason. It is abstractly impossible. It would make untrue an obvious, evident, and known fact, to wit, that Mrs. Owen was a British subject from the year 1910 until her naturalization in 1925. Indeed, Mrs. Owen could not be heard to dispute the fact, having applied for naturalization as a British subject. When she received her certificate of naturalization she forswore allegiance to the King of Great Britain.

Let us indulge in a few questions and answer them for ourselves.

Question. Who is the judge of the qualifications of Members of the House of Representatives?

Answer. The Constitution provides that the House of Representatives shall be such judge.

Question. Does the Senate have anything to say with respect to the qualifications of a Member of the House?

Answer. No.

Question. Does the President have anything to say with respect to the qualifications of a Member of the House?

Answer. No.

Question. Is the House of Representatives alone responsible for the enactment of the Cable Act?

Answer. No. The Senate concurred in its enactment and it required the signature of the President.

Question. Have we then permitted the Senate and the President to take from the House its exclusive right to judge the qualifications of its Members?

In our view the minority sets up a man of straw and then proceeds to rough it with him. They read into the constitutional provision a requirement that the seven years' citizenship shall be next preceding the election. Having read this requirement into the constitutional provision, they find it necessary to resort to mental acrobatics to avoid what they have done and to give Mrs. Owen the seat which she claims. This they do by giving the Cable Act a meaning which the language does not warrant and which is in direct conflict with the plain language in section 7 thereof.

Obedience to conscience and duty requires us to give consideration to the constitutionality of the Cable Act. That no court has declared the Cable Act unconstitutional is of no moment. For the purposes here considered the constitutionality of the Cable Act can only be determined by the House of Representatives. There is no other forum in which such constitutional question may be debated and no other body which can decide the question. The Constitution provides that the House of Representatives shall be the judge of the election and qualifications of its members. We must face that responsibility. We assumed such duty in full measure when, as individuals, we subscribed to the oath of office, the chief and central obligation of which requires us to support and defend the Constitution of the United States.

If the Cable Act may be interpreted and made available for Mrs. Owen, as the minority contend, it must follow as the night the day that Congress may, if it wishes, provide that an alien shall, after his naturalization, have

the status and enjoy the privileges of a natural born citizen, making him eligible for the office of President of the United States, contrary to the letter and spirit of the constitutional inhibition in that regard; and making him eligible immediately after his naturalization, as far as citizenship is concerned, for the office of Representative in Congress.

We of the majority think, if we accept the constitutional provision as written by the fathers, it is free from difficulty; that doubt only arises when we seek to change it by writing into it something not said by the framers. A review of the debates and proceedings of the Constitutional Convention convinces us that the omission of words, such as the minority would read into the provision, was not a matter of inadvertence.

The framers of the Constitution sought to avoid language or phraseology which is complex and shunned any hidden meaning. They employed language which is clear, simple, and easy of understanding. The ordinary rules of construction are natural. They forbid the adding of any intent not reasonably within the meaning of the language.

The fathers sought to place in the Constitution only principles fundamental in government. They undertook the task with imagination, with a large vision of things to come. By deliberate design they stated fundamental principles broadly expressive of the purposes sought to be accomplished. It was recognized that progress, incident to the development of the country and the working out of our political destinies, would present to future generations concrete problems not foreseen by them. They wished to express the genius of a new government, one "of laws and not of men." They wisely provided the skeleton which would support the living organism of a great republic, instituted for the government of free men. It was their desire to leave to Congress as fully as possible the opportunity and the responsibility of passing upon the qualifications of members. They deemed it wise that a Representative should have passed the ordinary period of education and should be possessed of mature judgment. They, therefore, provided that he shall have attained his twenty-fifth year. They considered it appropriate that a Representative should reflect the sentiment and views of his neighbors. To assure this they required that he shall be an inhabitant of the State in which he is chosen. The only other qualification was as to citizenship. The fathers very earnestly desired that Representatives in Congress should know our history and our institutions; understand our political hopes and aspirations and be in sympathy with them.

It is recognized that the obvious danger sought to be avoided was that of foreign influences. In requiring seven years' citizenship as a qualification for the office of Representative in Congress, it was hoped to guard against this danger, but nothing was said in the Constitution about foreigners or with reference to foreign influences. The fathers met this situation as they did all others. They sought a general principle which would effectuate their purpose. As a compromise of opinion and judgment, seven years citizenship was agreed upon as the length of time which might reasonably produce in the mind and character of a citizen the attitude and qualities deemed desirable for a Representative in Congress. The delegates preferred flexibility which would yield to the judgment of future generations and were content with a

statement of the qualifications mentioned, leaving the matter of qualification in other respects to the House.

Privileged resolution (H. Res. 241) was agreed to by voice vote after debate [H. Jour. 653, 71st Cong. 2d Sess.].

**§ 7.3 Lawrence v Milligan, 3d Congressional District of Missouri.**

*Ballots* were partially recounted by an elections committee upon adoption by the House of a resolution authorizing subpoena of certain election officials, ballots, and ballot boxes.

Report for contestee, who retained his seat.

On June 3, 1930, Mr. Randolph Perkins, of New Jersey, by direction of the Committee on Elections No. 2, submitted the following resolution:

*Resolved,* That Boude Crossett, county clerk of Clay County, Mo., be, and he is hereby ordered, by himself or by his deputy, to appear before the Committee on Elections No. 2 of the House of Representatives forthwith, then and there to testify before said committee in the contested-election case of H. F. Lawrence, contestant, against J. L. Milligan, contestee, now pending before said committee for investigation and report; and that said Crossett or his deputy bring with him the ballot box of Liberty North East precinct, Clay County, Mo., and all of the ballots contained therein, and all contents of the ballot box, and all papers in his possession which were used in said precinct at the general election held in the third congressional district of the State of Missouri on November 6, 1928. That said ballot box, ballots, and all contents of said box and papers in connection therewith be brought to be examined and counted by and under the authority of said Committee on Elections No. 2 in said case, and to that end the proper subpoena be issued to the Sergeant at Arms of this House, commanding him to summon said Crossett or his deputy to appear with such ballot box, ballots, and all contents of said box and papers in connection therewith, as witness in said case; and that the expense of said witness and all other expenses under this resolution shall be paid out of the contingent fund of the House; and that the aforesaid expense be paid on the requisition of the chairman of said committee after the auditing and allowance thereof by said Committee on Elections No. 2.

Privileged resolution (H. Res. 235) was agreed to by voice vote without debate [72 CONG. REC. 9960, 71st Cong. 2d Sess., June 3, 1930; H. Jour. 634].

Report of Committee on Elections No. 2, submitted by Mr. Randolph Perkins, of New Jersey, on June 6, 1930, follows:

Report No. 1814

CONTESTED ELECTION CASE, LAWRENCE V MILLIGAN

The Committee on Elections No. 2, having under consideration the contest of H. F. Lawrence *v.* Jacob L. Milligan, from the third congressional district of Missouri, report that in this ease the notice of contest was duly and lawfully given. The contestee, Jacob L. Milligan, answered said notice, making the issues submitted to this committee. Proof was taken.

This contest was regularly heard. Both the contestant, H. F. Lawrence, and his counsel, and the contestee, or sitting Member, Jacob L. Milligan, and his counsel, were present. The matters in issue were thoroughly investigated. Arguments of counsel were heard.

After the regular hearing of this ease upon the record and the argument of counsel it was apparent that the controversy turned largely on the vote cast in the northeast precinct of Liberty, Clay County, Mo., the contestant insisting that Jacob L. Milligan, the sitting Member and contestee, had been accredited with 125 more votes than he was entitled to in said precinct; the contestant insisting that the correct vote in this precinct as shown by return of precinct election officers was 173 votes for contestant and 345 votes for the contestee but that the returns certified by the county canvassing board of Clay County showed 173 votes for the contestant and 470 votes for the contestee.

The committee of its own motion directed that said original ballot box and ballots in said precinct be brought before the committee, that the count of the same might be made by said committee, which was accordingly done, and by said count as made by the committee it showed 170 ballots were cast for the contestant and 474 ballots were cast for the contestee.

The returns as originally certified showed that in said election the contestant received 32,626 legal votes and contestee received 32,665 legal votes. As shown by the recount and the change as above set out the contestant received 32,623 legal votes and the contestee received 32.669 legal votes, or a clear majority of 46 legal votes.

The contestee received his commission from the Governor of the State of Missouri and the oath of office was duly administered to him as a Representative in the Seventy-first Congress.

Your committee therefore unanimously report that the contest of H. F. Lawrence is without merit and that the contestee, Jacob L. Milligan, should retain his seat as a Member of the Seventy-first Congress.

*Resolved,* That H. F. Lawrence was not elected a Member of the House of Representatives in the Seventy-first Congress from the third congressional district of the State of Missouri and is not entitled to a seat herein.

*Resolved,* That Jacob L. Milligan was duly elected a Member of the House of Representatives in the Seventy-first Congress from the third congressional district of the State of Missouri and entitled to retain his seat herein.

Privileged resolution (H. Res. 252) agreed to by voice vote without debate [72 CONG. REC. 10652, 71st Cong. 2d Sess., June 13, 1930; H. Jour. 685].

**§ 7.4 Hill v Palmisano, 3d Congressional District of Maryland.**

*Ballots* were partially examined and recounted by an elections committee upon adoption by the House of a resolution authorizing subpena of certain election officials, ballots, and ballot boxes.

Points of order against the filing of an elections committee report (on grounds that inconsistent committee actions did not authorize the report and that the report was not timely filed) were reserved but not insisted upon.

Minority views were filed against the validity of the majority report.

On Feb. 19, 1930, Mr. Bird J. Vincent, of Michigan, by direction of the Committee on Elections No. 2, submitted the following privileged resolution:

*Resolved,* That Robert B. Ennis, president of the board of supervisors of election of Baltimore city, Bernard J. Flynn, member of the board of supervisors of election of Baltimore city; and Alexander McK. Montell, member of the board of supervisors of election of Baltimore city, individually and collectively as said board, and Gen. Charles D. Gaither, police commissioner of Baltimore city, all of the State of Maryland, be, and they are hereby, ordered, by themselves or by their deputy, to appear before the Committee on Elections No. 2 of the House of Representatives forthwith, then and there to testify before said committee in the contested-election ease of John Philip Hill, contestant, *v.* Vincent L. Palmisano, contestee, now pending before said committee for investigation and report; and that said persons or their deputy bring with them the ballot box and all the ballots contained therein, and all contents of the ballot box, and all papers in their possession which were used in the fourth precinct of the third ward of the city of Baltimore, Md., at the general election held in the third congressional district of the State of Maryland on November 6, 1928. That said ballot box, ballots, and all contents of said box, and papers in connection therewith, and also the registration books for said precinct, be brought to be examined and counted by and under the authority of said Committee on Elections No. 2 in said ease, and to that end that the proper subpoena be issued to the Sergeant at Arms of this House, commanding him to summon said persons or their deputy to appear with such ballot box, ballots, and all contents of said box and papers in connection therewith, and the registration books in said precinct, as witnesses in said case; and that the expense of said witnesses, and all other expenses under this resolution, shall be paid out of the contingent fund of the House; and that the aforesaid expense be paid on the requisition of the chairman of the said committee after the auditing and allowance thereof by said Committee on Elections No. 2.

Privileged resolution (H. Res. 159) was agreed to by voice vote without debate [72 CONG. REC. 3939, 71st Cong. 2d Sess., Feb. 19, 1930; H. Jour. 284].

On June 14, 1930, Mr. Randolph Perkins, of New Jersey, submitted the report of the Committee on Elections No. 2. On presentation of the report for filing, Mr. Malcolm C. Tarver, of Georgia, made the following point of order:

> The report has not been authorized. Now, Mr. Speaker, if I may be permitted to go on, I will state that on June 6, 1930, the Committee on Elections No. 2 held the last meeting it has held, and on that day voted 5 to 3 against seating contestant, John Philip Hill, and it voted 5 to 3 against throwing out the returns from the fourth precinct of the third ward in the city of Baltimore. The copy of the report that I hold in my hand is directly at variance with the action taken by the committee, in that the report finds that the returns from the fourth precinct in the third ward should be thrown out, when the committee voted that they should not be, and further finds that the contestant, if this is done, would be entitled to his seat in the House, whereas the committee voted to the contrary.
>
> There has been no meeting of the committee since then, and no resolution approved by the committee, although I presume that one that has been reported by the gentleman who is acting for the committee, except that the first portion of a resolution dealing with the rights of the contestant was approved by the committee by a vote of 5 to 3, finding that he was not entitled to his seat and had not been elected.
>
> The second part of the resolution was never placed before the committee, but the members of the committee were unable to agree upon its verbiage, and the statement was made that another meeting of the committee would be held in order that its verbiage might be agreed upon. Notwithstanding that, the gentleman purports to report to the House this morning a report which includes, I presume, a resolution which was not acted upon by the committee as to the rights of the contestee.

Mr. Bertrand H. Snell, of New York, objected that the point of order was not properly presented at this time.

The Speaker entertained the point of order and decided:

> Under the circumstances the Chair thinks the fair thing to do, he not being apprised of all the facts in connection with the matter, is to permit the report now to be printed, and the gentleman from Georgia may reserve his point of order, and if the case is called up the Chair will give the matter consideration.
>
> The Chair will permit the report to be received and printed at this time, but the gentleman from Georgia will have his full rights in the matter in case the report is called up.

Thereupon, Mr. Fiorello H. LaGuardia, of New York, submitted the further point that the report was not in order for the reason that it was presented in violation of paragraph 47 of Rule XI.

The Speaker announced:

The gentleman from New York reserves a point of order.

The following minority views were submitted by Mr. Lindsay C. Warren, of North Carolina; Mr. John J. Douglass, of Massachusetts; and Mr. Malcolm C. Tarver, of Georgia:

As a premise for what we shall say, the following actions of the committee should be called to the attention of the House:

First, at its meeting on June 6, 1930, the committee unanimously decided that aside from charges pertaining to the fourth precinct of the third ward in the city of Baltimore, there was nothing in the record authorizing interference with the result of the election as certified by the proper officials of the State of Maryland.

Second, by a vote of 5 to 3, the committee decided that the evidence did not justify throwing out the returns of said precinct.

Third, the effect of these findings being necessarily a conclusion that the contestant did not receive a majority of the votes cast at the election, the committee voted, 5 to 3, that the contestant was not elected and is not entitled to a seat in this House.

Fourth, a motion then being offered to the effect that the contestee was not elected and is not entitled to a seat in the House, two members of the majority indicated their inability to support such a motion, and while no vote was taken, these members, with the minority members, constituted a majority of the committee.

Fifth, a motion then being offered to the effect that the contestee is not entitled to a seat in the House, was adopted, 5 to 3, and it was agreed to ask for an extension of time from the House in which to agree upon the form of resolution to be reported and upon the contents of the majority report.

These recitals are sufficient to indicate that five members of the committee feel that Mr. Palmisano was elected; that of these, two feel that, although elected, he ought not to be seated, and that, combining the last two named with three who feel that he was not elected, produces a combination of two minorities to constitute a majority who are willing to report that he is not entitled to his seat. There is, therefore, no view of the ease which may properly be referred to as a majority view; there are three minority views; and it is fair to assume that the troubles of the majority in reconciling their views would be further accentuated if the beloved chairman of the committee had not been prevented from attending its session by illness. This statement is justified from remarks made by the chairman appearing in the hearings, the first of which, upon the opening of the ease, we quote:

> The CHAIRMAN. My own impression is that there is a great deal in the record that is not very material to the determination of the

> issue, which is, which of these gentlemen was elected by the majority of the legal ballots. (Hearings, p. 1.)

If the chairman is correct in the position stated, and we insist that he unquestionably is, then we respectfully insist that a majority of the committee has determined that question in favor of the contestee; and it has been possible to change this situation only by combining with the minority of three who did not believe Palmisano elected two gentlemen who felt justified in voting not to seat him, although elected. Since the majority report would not have been possible without them, we address ourselves first to their viewpoint.

The following additional minority views were submitted by Mr. John J. Douglass, of Massachusetts; Mr. Lindsay C. Warren, of North Carolina; and Mr. Malcolm C. Tarver, of Georgia:

Report No. 1901, Part 2

CONTESTED ELECTION CASE, HILL V PALMISANO

Under permission granted by the House on June 14, 1930, the undersigned members of the Committee on Elections No. 2 respectfully submit the following additional minority views in the contested election case of John Philip Hill *v.* Vincent L. Palmisano, third congressional district of Maryland.

In filing our original views, we could not anticipate that, notwithstanding the committee had voted 5 to 3 in favor of a resolution declaring that "John Philip Hill was not elected, and is not entitled to the seat," a report would be submitted containing no such recommendation.

Nor could we have anticipated that, notwithstanding the committee had voted 5 to 3 against discarding the returns from the fourth precinct of the third ward in the city of Baltimore, a report would be submitted recommending that the returns from the precinct mentioned be discarded.

Far less reason did we have to assume that the report would in effect recommend the seating of the contestant, directly at variance with the action of the committee. That a formal resolution to this effect was not reported is immaterial. No resolution was reported, not even the one providing that Hill was not elected and should not be seated, which was approved by the committee. The report, omitting this usual feature of a report in such a case, is so drawn as to form the proper basis for a resolution of no other character than that the contestant was elected and should be seated, and the contestee was not elected and should not retain his seat. In view of these facts, and in view of the fact that there is, or should be, in the possession of the acting chairman of the committee, two roll calls taken by him upon the questions detailed above, showing the action of the committee to be directly contrary to the report, we have preserved a point of order against the alleged report, upon the ground that it was not authorized by the committee; and by filing minority views, we do not waive nor intend to waive our right to insist thereupon.

We judge from the statement of the acting chairman when the point of order was made that he does not question the facts above stated, but takes the position that the report is not susceptible of the construction we have placed upon it. It is only necessary to point out—

1. That the report entirely omits to report the action of the majority of the committee upon the resolution finding that Hill was not elected and is not entitled to the seat.

2. That the report finds that if the fourth precinct of the third ward is thrown out, Hill was elected, and then proceeds to find that the count from this precinct should be disregarded. It is impossible to gather from this any other meaning than that the report is in favor of seating Hill, directly in opposition to the action of the committee.

We know of no case in the history of this House where action of so unfair a character in the preparation and submission of a report has ever been resorted to.

*Returns.*—Partial rejection of returns for fraud and irregularities by election officials and party workers that were sufficient to change the election result, and for fraud (insufficient to change the result) by contestee, was recommended by an elections committee majority.

The report of an elections committee majority recommended the unseating of contestee but was not accompanied by a resolution.

Minority views were filed recommending a resolution that contestee retain his seat and that contestant be held not entitled to the seat.

There was no House disposition of the contest, and contestee retained his seat.

Report No. 1901

At the general election held on the 6th day of November, 1928 in the third congressional district of the State of Maryland, the contestant, who was the candidate for Representative in Congress of the Republican Party, was credited with, according to the official returns, 27,047 votes, and the contestee, who was the candidate of the Democratic Party, was credited with, according to the official returns 27,377 votes.

Thus, according to the official returns, the contestee had a majority of 330 votes, and it was upon this majority, so found, that the certificate of election was issued to the contestee, and he was seated in the House of Representatives. . . .

The decision of the case hinges very largely upon two questions, the first of which is the conduct of the election and the canvass in the fourth precinct of the third ward of the city of Baltimore, and second, the personal knowledge and conduct of the contestee, Palmisano.

The election board returns from the fourth precinct of the third ward gave Palmisano 416 votes and Hill 61 votes, a difference of 355 votes, an amount greater than Palmisano's apparent plurality upon the total official returns.

If the returns from this precinct be counted, it will give a majority to the contestee. If the vote be thrown out, it will result in giving a majority to the contestant.

THE CONDUCT OF THE ELECTION AND THE CANVASS OF VOTES IN THE FOURTH PRECINCT OF THE THIRD WARD OF BALTIMORE, PALMISANO'S HOME PRECINCT

. . . This committee finds that the election board in the fourth precinct of the third ward flagrantly disregarded every provision of the election laws of the State of Maryland with respect to the taking the ballots from the box; the counting, recording, and certification of the ballots in that precinct.

No attempt whatever was made by the election board to follow the law as to counting, recording, or certifying the vote in this precinct.

The certificate of the election board was made out and signed in blank by the election officers before the polls were closed. No reliance can be placed upon such a certificate. Later, the figures were filled in over the signatures of the members and indicated that Palmisano received 416 votes, and Hill received 61 votes. In fact, this is not a certificate. It is merely a paper signed in blank. The filling in of the figures over the signatures to make it appear to be a certificate of return did not make it such. The election officers opened the door to a fraudulent return when they signed the blank certificate.

In every important particular this election board set itself above the laws and conducted the count and tally in a manner to suit themselves, and without reference to the rights of the voter.

In the total of the vote upon which the certificate of election of the contestee was based, the 416 votes given him in this certificate furnished more than his entire plurality in the whole election district. We do not consider that any reliance can be placed on this return, especially in view of the way the votes were not counted or tallied in accordance with the law.

The law is clear in its provision that the judges shall open the ballots and that the ballots shall be canvassed separately by them, one by one. This was not done. The ballot box was opened and unauthorized persons dipped their hands into the box and took out ballots in bunches. In fact, one witness, who was not a member of the election board, says that he took all of the ballots out of the box in bunches. It is perfectly clear that the law requires that the judges shall withdraw the ballots one by one and that the ballots shall be read separately when taken out of the box, and that the tallies shall be made as the ballots are read. No such thing was done. Four or five of Mr. Palmisano's ward workers came into the polling place immediately after the closing of the ballot box, and they acted as though they were members of the election board. That is, they participated in withdrawing the ballots from the boxes, distributing them around the room, arranging and rearranging their order, counting or pretending to count them, and announcing results or imaginary results from the ballots.

The ballots were distributed around the room, in which, as stated, at least four unauthorized persons were assuming to participate in the duties of the election board. The judges did not call out each name and the office for which it was designated and no tallies made from reading of the ballots (ex-

cept possibly the so-called split ballots), but on the contrary, separate piles of ballots were made in various parts of the room. Some ballots were placed on a small table, which one witness says was only about 24 by 24 inches, other ballots were placed on chairs and some witnesses says ballots were placed on the floor. There was apparently general confusion in the room caused by the election officers or some of them, and the four Palmisano ward workers, while sorting or shuffling of the ballots took place. This was done before any ballots was counted, and continued after the alleged counting began. Protests were made by some of the election officers against this method of handling the ballots, but the protests were unheeded by the judges of election.

This general assorting, assembling, and segregating of ballots was said to be done with the avowed purpose of separating the ballots into separate piles or packages of what were supposed to be straight Democratic ballots, straight Republican ballots, and split ballots. This took place in a small and crowded room and was participated in with a great deal of activity on the part of outsiders, who had no right to touch the ballots. It is impossible for your election committee to know whether or not the ballots eventually assorted into piles of so-called straight ballots and split ballots, were the ballots actually cast by the voters in the ballot box, or ballots largely substituted by the unauthorized and overzealous and active ward workers of the contestee. There is no doubt that there was ample opportunity for the substitution of ballots. The opportunity was there. All it needed was the desire to substitute ballots. Of those participating in this illegal proceeding were at least four ward workers of Palmisano, who during practically the entire election were drumming up votes for him. Their job was to get votes for Palmisano, and when they assumed the job of assisting in the arranging, segregating, and counting of the ballots, there is no reason to believe that they laid aside their partisanship, and that they instantly ceased to be anxious for Palmisano's election, and that their assiduity was instantly chastened, so that they would carefully guard the rights of Palmisano's opponent.

We hold that in a hotly contested election, like the one under consideration, opportunity to substitute ballots, coupled with a reasonable degree of probability of desire to substitute ballots, is sufficient justification for the committee to believe that some substitutions actually took place, and if the other acts of the election board are open to question and suspicion, and contrary to the plain provisions of the statute, the committee is justified in refusing to condone the election officers' violation of law. This necessitates disregarding the certificate of the election board, and a refusal in this ease to credit the contestee with 355 votes over his opponent in this precinct.

The count was not made by examining the ballots and ascertaining for whom the votes were cast, as required by the election law. After the sorting and shuffling of the ballots, the so-called straight Republican and straight Democratic ballots were placed in piles and counted by fingering over and counting the edges of the ballots, one after the other, and a count made of the number of ballots in each particular pile, and announcement made by election officers or ward workers, as the case might be, "So many straight

ballots for So-and-So." In doing this, the names on the ballots were not examined, or read by the judges, nor were they called off, but it was announced in a general way, such as "100 straight Democratic ballots," or "10 straight Republican ballots," or whatever the supposed count might be. While this was going on, there was an effort made to actually count the split ballots. That is to say, to count the split ballots for the top of the ticket. It is perfectly clear from the evidence that persons were attempting to call off the names on the split ballots while other persons were shuffling or sorting, or apparently segregating straight ballots.

That the election officers in this district were guilty of the grossest kind of fraud on the electorate, is demonstrated by the fact that on the ballot there was a State constitutional provision to be voted "for" or "against." No count whatever was made by anyone, of the votes for this provision or against it. The election officers did not even examine the ballots for the vote on this question. They were not interested in the subject. The fact that the fundamental law of the State of Maryland was proposed to be changed, and that the rights of the people of the entire State affected, did not impress this election board sufficiently to cause them to count the votes either for or against the constitutional amendment. Those who were conducting the count, including the four unauthorized ward workers of Palmisano, were so interested in the top of the ticket, including Mr. Palmisano's election, that they not only refused to count the votes for and against the constitutional amendment, but actually entered into a fraudulent agreement to make a false return with respect to them, and did make a false return and certify them as a certain per cent for and against.

On the ballot also were two propositions for amendments to the city ordinances of Baltimore. These received exactly the same kind of treatment as did the proposed amendment to the constitution of the State. No election officer counted one vote for the amendment, or for the ordinances, and no election officer counted one vote against them. What they did was to actually enter into a conspiracy by which they agreed to report false and arbitrary figures on the amendment and ordinances and falsely certified that the result of the election in that precinct was 40 votes for the constitutional amendment and 15 against, and 30 votes for ordinance No. 539 and 20 votes against, and 35 votes for ordinance No. 538 and 25 against, and this without counting a single vote for or against the constitutional amendment, or for or against either ordinance. And under this return, acknowledged by themselves to be false and fabricated this election board signed a certificate as follows:

> We do certify that the above statement is correct in all respects, with this our hands and seals this 6th day of November, 1928.

With this acknowledged false certificate and false return confronting your committee, it can not place any reliance upon the action of this election board nor rely upon the integrity of the ballots it placed on a string and deposited in the ballot box after the alleged count.

We hold that where election officers are so derelict in their duty and so easy of conscience as to enter into an arrangement not to count the votes for a constitutional amendment or for city ordinances, but on the contrary, agree to put down a false return on these votes, that their returns are entirely unreliable, so far as the balance of the tickets is concerned.

The election officers in their count were so eager to make some sort of showing on the top of the ticket that they failed to pay attention to the Socialist vote, and did not count or correctly record it.

The conduct of the election board was undoubtedly largely influenced by the four unauthorized ward workers of Mr. Palmisano, who were unlawfully participating in the count, and the result of their participation was in some degree, to intimidate at least one or two of the Republican election officers. There is evidence that Republican members of the board were denied inspection of some of the ballots being counted by contestee's ward workers. Protests of election officers on the Republican side were disregarded by a majority of the election officers, and one election officer was so far intimidated that she was afraid to enter a protest.

This committee holds that the conduct of the election board in this precinct with respect to the custody, count, tally, and certification of ballots was in total disregard of and disobedient to the provisions of the laws of the State of Maryland. That the certificate of return of 416 votes for Palmisano and 61 for Hill, is unreliable and incorrect and untrustworthy. That the tally sheets in this precinct are false and fraudulent tally sheets. That the count of the vote is unreliable and uncertain, and participated in by Palmisano's workers and is tainted with fraud. That the election officers were guilty of false and fraudulent returns in respect to the Socialist vote, the vote for and against the constitutional amendment and the vote for and against the city ordinances. That the ballots were not counted by the election officers in accordance with the law, and by reason of the false and fraudulent and illegal conduct of the election board and other unauthorized persons participating in the count, that this committee is not justified in giving Mr. Palmisano 355 votes in excess of Hill's vote in this precinct

We can not and do not place the seal of approval on the conduct of this election board in this precinct nor accept the ballots and returns as genuine, and this, when taken in connection with the personal conduct and knowledge of Palmisano hereinafter considered, requires us to report that he was not elected and should not retain his seat in this House.

THE PERSONAL KNOWLEDGE AND CONDUCT OF THE CONTESTEE, PALMISANO

Palmisano resided at 320 High Street, Baltimore, in the precinct dealt with above in this report.

He was the Democratic executive in the ward and was conversant with this precinct and its voters. He spent a large part of election day, 1928, in and about the fourth precinct of the third ward, and near the end of the day, he supervised his ward workers from that polling place, sending them out to bring in votes. There were registered from Palmisano's house in this precinct, his brother-in-law Vincent Fermes, and his wife Anna Fermes. The

undisputed fact is that both Vincent and Anna Fermes resided in Hagerstown, Md., and had resided there for several years and were voters there.

The names of both Vincent and Anna Fermes were voted on from Palmisano's residence at the election on November 6, 1928. Vincent's name was voted on just before the polls closed, being the next to the last vote cast, and while Palmisano was at the polling place.

Palmisano knew that his brother-in-law and sister-in-law were not entitled to vote in his precinct and knew that they were not residing in his home. He knew that they actually lived in Hagerstown.

These votes so cast on the names of Vincent and Anna Fermes were illegal and fraudulent, and in the judgment of your committee, were cast with the knowledge, consent, and approval of the contestee, Palmisano.

The efforts of contestee's attorney to explain away the voting on the names of Vincent and Anna Fermes only got the contestee into deeper water.

In the first hearing before the committee, counsel for contestee questioned the authenticity of the markings on the registration and poll lists showing that contestee's brother-in-law and wife had voted from contestee's home, by innuendo and finally, direct accusation, accused the agents of the contestant with being responsible for the record and having changed the same for the purpose of casting suspicion upon contestee. Upon opening the ballot box, an examination of the ballots and poll books therein contained it was conclusively demonstrated that the questioned votes had in fact been cast as shown by the records questioned by the contestee. At the final hearing of this case, contestee's counsel was questioned as to what his position then was under the evidence as disclosed by the ballot boxes.

We find as a fact, that the evidence shows conclusively that the contestee participated in the voting activities of the day in his precinct and had knowledge of the fraudulent voting on the names of Anna and Vincent Fermes, and another; and that his workers were in large part responsible for the illegal and fraudulent conduct at the polling place after the ballot box was opened for counting the vote.

It may be contended that if fraud was committed it was purged by the recount of the ballots in this box by the committee. We hold that inasmuch as the recount proved conclusively the fraudulent voting on the name of Anna Fermes and Vincent Fermes, close relatives of the contestee, registered from his house, as well as others, the count by the committee can not be taken to purge the fraud and give the contestee a seat in this body. Those who perpetrate fraud always make an effort to have the results appear to be genuine. It may be that the votes taken from the box by the committee and counted were in large part actually cast by voters in that precinct; but the committee does not know whether they were or not and does not find that they were, and it is impossible for anyone to find out whether they were or not.

Having first determined that the conduct of the count, tally, and the certificate of the election officers was entirely contrary to law and that opportunity had been afforded by the election officers for partisan workers of the contestee to not only participate in the handling of the ballots, but in the

removing from the ballot box, sorting, shuffling, and pretended count thereof, we have come to the conclusion that we can say that the ballots counted by the committee were genuine ballots cast by the voters. For this reason, and in view of the committee's findings that Palmisano was personally chargeable with fraud, we find that he was not elected, and that he should not be permitted to retain his seat in the House.

The following is from the initial minority views submitted by Mr. Lindsay C. Warren, of North Carolina; Mr. John J. Douglass, of Massachusetts; and Mr. Malcolm C. Tarver, of Georgia.

Two of the Members constituting the majority contend:

. . . that acts of fraud in connection with the election in the fourth precinct, third ward, were committed with the knowledge of the contestee, which, while not sufficient to change the result, or to authorize throwing out the precinct, yet should disqualify the contestee from occupying a seat in this House.

We respectfully submit that the issue raised by the notice of contest in this case was simply whether or not the contestant or the contestee had been elected. No question of the contestee's unfitness to occupy his seat was raised thereby, and, under the law and repeated decisions of the House, no issue not raised by the contestant in accordance with settled procedure in contested-elections cases was before the committee for consideration.

The Constitution points out the mode, and we submit that it is the only mode, for unseating a Member who for any cause is unfit or unworthy to hold his seat. The Constitution provides that the House may "with the concurrence of two-thirds expel a Member." (Constitution, Art. I, sec. 5, par. 2.)

If the issue had been properly raised, we submit that there is no case among the hundreds of precedents in the House of Representatives where any sitting Member has been unseated because of alleged participation in isolated acts of alleged fraud, insufficient, if true, to have affected the result of the election. . . .

We have no fault to find with the conclusions of the three members who felt that because of gross fraud, rendering the ascertainment of the correct result at that precinct impossible, the fourth precinct of the third ward should be thrown out, provided the House finds that the evidence in the record justifies such a finding, which we most earnestly deny; but we do insist that the position of those who feel that the sitting Member should be denied his seat, although the precinct should not be thrown out, and although with it considered the contestee was elected, is untenable. With all votes which could possibly be attacked for illegality considered as votes for the contestee, when the evidence entirely fails to show for whom they were cast, and excluded from the count, a difference of not exceeding half a dozen votes could be made in the return, where as the contestee was elected by a majority of 330. If the entire fourth precinct of the third ward should be thrown out, a majority of 25 votes for the contestant would be established, but only three members of the committee thought this course justified.

We now approach a discussion of the evidence alleged to support the findings relative to fraud in the fourth precinct, third ward, participated in by the contestee; but before doing so we desire to call the attention of the House to the manner in which at least one member of the majority approached a consideration of this question, and to submit to the House the question of whether or not, after considering the evidence in the case, they would not be justified in believing that his viewpoint must have impressed his colleagues. It will probably prove surprising to most of the membership of the House to know that at least one member of the majority of the committee believed that when a charge of fraud is made by the contestant in an election case, the burden does not rest upon him to prove it, but at once shifts to the contestee to show that it is not true. . . .

At this point, we desire to indicate our severe disapproval of the action of the contestant in this case in making numerous serious allegations against the contestee and election officials of the city of Baltimore, which, it is not insisted, so far as we have been advised, by any member of the committee, are supported by any evidence at all. Out of 30 specifications of charges, only 3, dealing with alleged irregularities in the fourth precinct of the third ward in the city of Baltimore, appear to be held to be worthy of consideration by the majority of the committee . . . In addition to the above, which are only instances of the unsupported charges made by the contestant, we can not allow this case to pass into history without calling attention to the baseless, unnecessary, and gratuitous attack made by him upon the contestee (see pp. 3, 13, and 14 of contestant's brief, and also see evidence in record), on account of his having been once, as a young man, more than a score of years ago, charged with a violation of the naturalization laws, the contestant also making other bitter personal charges against him which could in no way, if true (and they are not sustained by the proof) affect the merits of this case. These attacks appear to have been made largely for the purpose of calling the attention of the Congress to the contestee's foreign birth, and with the intent to prejudice his cause by extraneous matter. . . .

Sitting as a court, exercising judicial functions, let us find out what the record shows with reference to the charges of fraud in the fourth precinct, third ward, and the contestee's participation therein, which are now as we understand it, the only charges relied upon by contestant. We will not include a summary of the evidence of the multitudinous witnesses who knew nothing but who were nevertheless subpoenaed and testified, but we shall clearly demonstrate to any Member of the House who will take the trouble to make an examination of the record that these charges, in so far as they involve any culpability of the contestee, are not only not proven by any evidence, but that the rule laid down by Mr. Eaton has been met, and they have been most emphatically disproven.

It will be observed that these charges are not stated in the notice of contest except in a vague, general, and indefinite way as to some of them, while some of them are not referred to in that notice at all. We do not believe that, over the protest of the contestee as set out in his reply to the notice of contest, these charges so vaguely and indefinitely made form, under the precedents and procedure of the House, a proper basis for the consideration of the

evidence introduced. In most cases, it is necessary to look to the evidence introduced to determine what the charges are, when they should be ascertainable from the notice of contest. But, assuming that the House may look to the evidence to ascertain the charges, and may not require that only charges made in the notice of contest be considered, we shall take them up as far as we have been able to ascertain them.

First, with reference to the charges of illegal registration from the contestee's house, the record discloses that each and every voter registered from the contestee's house was entitled so to register at the time registration was had. That some of them afterwards moved away and were not living there at the time of the election can in no way affect the question of their right to register at the time they did.

Second, with regard to the voting of some two or three of these persons who, before the election, had removed temporarily or otherwise, as one may be inclined to view the evidence, to other parts of the city of Baltimore, it is undisputed that many scores of Republican voters who had formerly resided in this precinct, or in other precincts of the district, upon changing their residences had been permitted to retain their registration in the precincts from which they removed, and voted in those precincts in the election herein referred to. This appears to have been quite a general practice, recognized as legitimate by both the Republican and Democratic Parties. As to whether it is permissible under the laws of Maryland, we do not undertake to say, while we have been furnished with an opinion of the attorney general of that State holding, in effect, that it is; but in any event, the voting of two or three people under these circumstances for the contestee, when so many voted under similar circumstances for the contestant, is a long way from constituting fraud, either vitiating the election, or tainting the contestee with personal corruption. If desired, the votes may be discarded, without even remotely affecting the result.

Third, with regard to the votes of Anna and Vincent Fermes, sister-in-law and brother-in-law of the contestee, which were cast by some other persons voting in their names, it should only be necessary to quote from the record of hearings the following statement of the contestant himself with reference to this matter:

> Mr. TARVER. I understand your point is that not only were they [i.e., Vincent and Anna Fermes] falsely registered, but that you were charging Mr. Palmisano with fraud in that he was present when they voted?
>
> Mr. HILL. No; only that he knew that they registered.

Notwithstanding that the contestant expressly disclaimed any charge of fraudulent knowledge on the part of the contestee, the majority of the committee feel justified in assuming it from the evidence; and this evidence shows nothing more than that the person voting in the name of Vincent Fermes voted a minute or two before the polls closed, and that Palmisano had been in the voting place at a period of time variously estimated by contestant's witnesses at from 5 to 15 minutes prior to closing. For whom the person voted, is not shown; that Palmisano was present, or, if present, had

his attention called to the person voting, is not shown. Another remarkable circumstance is that the knowledge that some person voted in the name of Vincent Fermes comes from the contestant, who has failed to give the source from which he derived the information. Who gave him that information? How did that person know it? Is it not fair to assume that the person who detected the impersonation of Fermes would have been called, if his testimony would have been helpful? If Palmisano had been concerned in voting somebody under another person's name, it would be more probable that he would select one of the numerous other registered voters as shown by the evidence who had not appeared to vote, rather than his own brother-in-law, as the person whose name was to be voted. In the entire absence of any legal evidence that Palmisano in any way participated in the fraudulent voting of the persons who voted under the names of Vincent and Anna Fermes, or benefited thereby, there occurs to us no reason why the committee or the House should make and insist upon a charge which the contestant himself disclaimed any intention of making.

Fourth, the only evidence with reference to alleged repeating in the fourth precinct of the third ward or elsewhere is that of the witness, Max Steiner, who is shown by the record beyond reasonable question to be entirely unworthy of belief. His evidence, however, if believed, casts in no way any reflection upon Mr. Palmisano, or connects him with the alleged irregularities, or shows whether he or Mr. Hill benefited thereby, if they occurred. Steiner claims to have been acting upon the direction of one Jack Pollack, and admits that he did not talk at all with Palmisano, and only saw him once at a distance on the day of the election. The attorney for the contestant made in his argument the following statement:

> Mr. TARVER. Is there anything in this record and, if so, I would like to have you point it out to me, showing that Palmisano had anything to do with Pollack or his activities?
>
> Mr. RUZICKA. No, there is not.

In the face of this admission, it seems a useless waste of time to consider the evidence as to what Steiner did under Pollack's direction, but if it is considered, it is not shown that he knows the name of a single voter whom he charges with repeating; nor that he saw any voter vote twice; nor whom any such voter voted for; nor are any other facts set out which, if believed, and if Palmisano had been directly responsible therefor, instead of being expressly absolved by the contestant's attorney from all culpability, would in any way constitute a reason for setting aside the result of this election, either in the fourth precinct of the third ward or elsewhere.

Fifth, the only other evidence of irregularity in the fourth precinct of the third ward which the committee appeared to deem worthy of consideration, and it is to be presumed that it will so appear in the majority report, was the evidence with reference to the handling of the ballots after the polls closed. There is some evidence that unauthorized persons, present in the polling booth, in the presence of the election judges and clerks, lifted the ballots or part of them from the boxes and laid them on tables to be counted. The committee, desiring to know whether the irregularities complained of

had resulted in a fraudulent count, procured the passage of a proper resolution by the House and sent for the ballot boxes in this precinct. When produced they were properly sealed in accordance with the laws of Maryland and their custody since the election was properly accounted for. No question exists as to these facts. Upon opening the boxes and recounting the votes, it was found that whereas the officials' return had showed a total of 507 votes cast, the committee's count showed 501; that the officials' return showed 416 for Palmisano and 61 for Hill, whereas the committee's count showed 405 for Palmisano and 62 for Hill. There were 26 blanks in the congressional vote and two spoiled ballots. The difference between the count and the official returns was therefore inconsiderable, and such as may easily have resulted from a difference in the interpretation by the election officials and by the committee of what constituted a spoiled ballot, or a ballot upon which the voter had indicated no preference for a candidate for Congress.

It was seriously insisted in the beginning of the case that there were 70 blank ballots in these boxes which had been counted, and that claim was supported by some evidence of a witness who had testified to other irregularities, and the failure to find these alleged blank ballots throws light on the credibility of the remainder of the evidence of this witness. A claim was also seriously insisted upon to the effect that in the removal of the ballots from the boxes and counting them, ballots for Palmisano could have been substituted for ballots for Hill. We regard this contention as entirely untenable. Aside from the fact that all the Republican officials of the precinct were present and participating in the count, and that nobody testifies to such a substitution, it appears that each of the ballots was initialed at the time of its delivery to a voter by the Republican judge, Daniel Wolf, the initials D. W. being written on each and every ballot. The committee examined each ballot carefully to ascertain if these initials appeared on every one. They did so appear. It is apparent that to have substituted ballots in the presence of the Republican officials, bearing initials written thereon by the Republican judge, or even by any other election official present by his authority, as it was insisted might have been done, would have been an impossibility. . . .

Aside from the questions discussed, the following is submitted:

The committee did not feel justified on account of the alleged irregularities in throwing out the box, and voted against so doing, therefore they must have found that the result at that box was legally ascertainable, and under the decisions of all courts that we have examined and all precedents of this House, under such conditions effect will be given to the properly ascertained result. It can not be stressed too strongly, however, that the evidence fails entirely to show that the contestee had anything to do with the irregularities complained of.

The issue involved in this ease should not only not be regarded as a partisan issue, but even if it should be so regarded, the evidence fails to show that the contestant in his campaign stressed his allegiance to the Republican Party, and, singularly enough, does show that he failed to announce his support of the candidacy of the standard bearer of that party when repeatedly challenged to do so. The statement is made because a considerable

part of the record is devoted to evidence relative to this subject matter, as well as to the efforts of the contestant and contestee each to convince a "wet" constituency that he was the "wetter" of the two.

As indicating the absence of fraud affecting the result in the fourth precinct of the third ward, attention is called to the fact that although only 32 Republicans were registered Mr. Hill received 62 votes. . . .

The premises considered, we propose the following resolution as a substitute for the resolution recommended by the majority of the committee:

> *Resolved,* That John Philip Hill was not elected as Representative in the Seventy-first Congress from the third congressional district of Maryland, and is not entitled to the seat as such Representative.
>
> *Resolved,* That Vincent Palmisano was elected as such Representative in the Seventy-first Congress from the third congressional district of the State of Maryland and is entitled to his seat as such Representative.

The following is from the additional minority views submitted by Mr. John J. Douglass, of Massachusetts; Mr. Lindsay C. Warren, of North Carolina; and Mr. Malcolm C. Tarver, of Georgia:

An examination of the alleged majority report discloses that the minority report heretofore filed, in so far as it discusses the evidence before the committee, covers a broader field than the majority report, and it is now necessary to add very little to the previous minority report.

The majority report still insists upon the allegation that Palmisano knew of and was concerned in the fraudulent voting of two people under the names of Vincent and Anna Fermes, although the contestant, before the committee, expressly disclaimed such a contention, and did not make it in his notice of contest. (Hearings, p. 90.)

The report further sets up as one of the principal reasons assigned for discarding the returns from the fourth precinct of the third ward that the certificate of the election board was signed before the numbers of votes received by the respective candidates were filled in. The contestant made no such charge in his notice of contest, in which the law, as well as the practice and procedure of the House, requires him to "specify particularly the grounds upon which he relies in the contest." (U.S.C., title 2, ch. 7, sec. 201, p. 13.)

If the benefit is given to him, however, of a charge not made in the manner provided by law, it will at once appear that the practice of election officials in signing returns in blank, afterwards filling in the blanks in accordance with the facts, while an irregularity, yet where it is clearly shown, as in this case, that it was done without fraudulent intent, participated in alike by the officials of both parties, and resulted in no fraudulent miscount or return is too inconsiderable a technicality to result in depriving the voters of this precinct of their votes, and thereby declare elected a man whom no reasonable man can believe from reading the evidence in the record was elected.

The statement in the majority report that "the election board in the fourth precinct of the third ward flagrantly disregarded every provision of the election laws of the State of Maryland with respect to the taking of the ballots from the box, the counting, recording, certification of the ballots in that precinct" expands without limit the already indefinite charges made by the contestant and is in itself too indefinite in character to require comment. We shall, however, in so far as we have not already done so, refer specifically to every definite charge made.

In our original minority views we have discussed the question of some persons or person, according as one views the evidence, lifting some of the ballots out of the box in the presence of all of the officials, both Democratic and Republican, and laying them on a table and chair.

Criticism is now made that the judges did not read the ballots one by one, but placed straight Democratic and straight Republican ballots in separate piles, counting only the number of ballots in these piles, but counted and tallied one by one the split ballots. We call attention to the fact that in a number of precincts carried overwhelmingly by the contestant, the same method of procedure in the counting and tallying of the votes was followed. It was the method followed in first precinct of the eighth ward, which was carried by the contestant by 229 majority (see record, pp. 552–553); in the thirty-fourth precinct of the eighth ward, which gave the contestant a majority of 125 (see record, p. 556); in the thirteenth precinct of the eighth ward, which gave the contestant 87 majority (see record, p. 561); and appears to have been a matter of quite general practice in the district. That the following of this method should be "fraud" when it occurs in a district carried by the contestee, but ignored when it occurs in districts or precincts carried overwhelmingly by the contestant, seems to be inconsistent. If the explanation be that the contestee made no counter charges with regard to the precincts carried by the contestant where this method of count was used, it occurs to us that if the contestant is not restricted to the charges made in his notice of contest, there is no reason why the gates should not be opened wide and every feature of the election developed by the evidence considered. We do not feel, however, that charges not made by the contestant should be considered, but we do feel that, with regard to this particular charge, the practice in other precincts carried by the contestant should be considered as illustrating the allegations of willful fraud in the fourth precinct of the third ward.

It is interesting to note that wherever in the majority report the activities of the Democratic workers at the polls are criticized, they are referred to as "workers of the contestee." They appear from the record to have worked far more efficiently for the Democratic presidential candidate, who received a majority of 427 in the fourth precinct of the third ward, and for the Democratic candidate for the Senate, who received a majority of 402, as against Palmisano's majority of 355. In fairness, these workers can not properly be referred to as "workers of the contestee." But no matter whose workers they were, no provision of the law of Maryland is quoted by the majority which made illegal their presence in the polling booth while the count was going on. And in so far as they or either of them may have participated with Re-

publican officials, who, according to their own evidence, were doing the same thing, in lifting ballots out of the box and placing them on a table and chair to be counted, their acts, and the acts of the officials, Democratic and Republican, who participated, were a violation of directory, not mandatory, provisions of the Maryland law, and will not invalidate the return from the precinct in question, if it is possible, notwithstanding those acts, to ascertain the correct legal vote.

The view of the majority of the committee, as reported to the House, to the effect that on account of the counting of the ballots in the method described by some of the witnesses, it is impossible to correctly ascertain the vote in the congressional race at the fourth precinct of the third ward, and that the recount had by the committee should be disregarded because of this alleged fraud, is not logical. The majority of the committee, as well as the minority, knew of the alleged irregularities in the count before the ballots were ever sent for. If it was felt that the evidence justified rejecting the returns from this precinct and that the committee could not know whether the ballots in the boxes were the ballots east by the voters or not, as now stated by the majority, why were the ballots sent for? Is it possible that the majority of the committee were expecting to find in the box corroboration of the evidence of contestant's witness, Yospi, that there were 70 blank ballots in it, and, since the box disclosed that this evidence was untrue, felt that sending for it in the first place was ill-advised? Shall evidence be regarded as of value until it is found not to support the position assumed, and then discarded as untrustworthy? The suggestion that there might have been any substitution of ballots is so unreasonable under the evidence in this ease as to hardly require comment, and especially is this true when it is remembered that each ballot bore in his own handwriting the initials of the Republican judge, Daniel Wolf. We say "in his own handwriting," because repeated insistences by a member of the committee who now signs this minority report that Wolf be sent for to show the contrary if there was any question in the minds of the committee about it were declined.

Whatever the irregularities in the method of counting the ballots, when the House comes to the question of discarding the committee count, we feel assured it will not agree with what is said in the alleged majority report, and when it is remembered that it would only be necessary to find that this Democratic candidate for Congress received a majority of as much as 26 in a precinct where 507 votes were cast and where only 32 Republicans were registered, and where other Democratic candidates received majorities in excess of 400, in order to find that he was elected, we shall continue to believe that the tide of partisanship has not arisen; and never will arise, to the height in this House necessary to unseat contestee until the House itself by its action shall convince us to the contrary.

No resolution was offered to accompany the majority report. There was no House disposition of the contest and contestee therefore retained his seat.

**§ 7.5 Updike v Ludlow, 7th Congressional District of Indiana.**

The time required by House rules for filing of an elections committee report was extended by the House by adoption of a resolution.

*Qualifications of Member.*—The constitutional requirement of inhabitancy in the state when elected was held fulfilled where the Member maintained an "ideal" or intended residence in the state as evidenced by voting and tax payments, though his actual residence was in another jurisdiction.

Report for contestee, who retained his seat.

On June 25, 1930, Mr. Carroll L. Beedy, of Maine, submitted the following resolution by unanimous consent:

> *Resolved,* That the Committee on Elections No. 1 shall have until January 20, 1931, in which to file a report on the contested election case of Updike v. Ludlow, notwithstanding the provisions of clause 47 of Rule XI.

The resolution (H. Res. 270) was agreed to by voice vote without debate [72 CONG. REC. 11701, 71st Cong. 2d Sess., June 25, 1930; H. Jour. 737].

Report of Committee on Elections No. 1 submitted by Mr. Carroll L. Beedy, of Maine, on Dec. 20, 1930, follows:

Report No. 2139

CONTESTED ELECTION CASE, UPDIKE V LUDLOW

[To accompany H. Res. 326]

In May, 1928, Louis L. Ludlow was the successful nominee in the primary elections for Representative in the National Congress on the Democratic ticket from the seventh district of Indiana. In November of that year, Mr. Ludlow is conceded to have received a majority of 6,380 votes for Representative to Congress from the seventh district of Indiana. His election, however, was contested by Ralph E. Updike, of the seventh district of Indiana, who was the nominee for Representative to Congress from the district in question on the Republican ticket in the November elections of 1928.

Mr. Updike contested Mr. Ludlow's election on two grounds—first, upon the ground that Mr. Ludlow was not an inhabitant of the State of Indiana within the meaning of article 1, section 2, of the Constitution, which provides among other things that, "No one shall be a Representative who shall not . . . be an inhabitant of that State in which he shall be chosen"; second, upon the ground that the November elections in question were tainted by fraud and corruption.

In the course of the contest, the allegation of fraud and corruption was abandoned and the issue finally turned upon the question as to whether Mr. Ludlow was an inhabitant of the State of Indiana in November, 1928, within the meaning of the constitutional provision above cited.

It appeared that Mr. Ludlow was born in Indiana and resided there until the fall of 1901, at which time he came to Washington to serve as a newspaper correspondent for an Indianapolis newspaper. From that time, Mr. Ludlow continued to represent various Indiana and other newspapers until the 4th of March, 1929. His family, however, continued to reside in Indianapolis until 1915, coming to Washington with him only for short stays. At that time he sold the house in which he and his family had resided and which was located at the corner of Ritter and University Avenues in the city of Indianapolis.

From 1915 Mr. Ludlow, with his family, resided in Washington, D.C., but his family made frequent visits to their relatives in Indianapolis. During his residence in Washington, D.C., Mr. Ludlow, with his family, attended the Union Methodist Church. In fact, Mr. Ludlow was a trustee of that church. From the time his family took up its residence in Washington, his four children, who, prior to their removal from Indiana, were educated in the public schools of Indianapolis, were educated in Washington, D.C.

It also appeared in evidence that Mr. Ludlow had engaged to some limited degree in the purchase and sale of real estate in Indianapolis. With the exception, however, of one piece of property to which I shall presently refer, Mr. Ludlow disposed of all his real estate holdings within the seventh district of Indiana in 1925.

In 1918 Mr. Ludlow purchased from his wife's sister her portion of a farm, formerly owned by Mrs. Ludlow's father. Mrs. Ludlow meanwhile had inherited a one-third interest in the farm in question. This property of Mr. and Mrs. Ludlow, which comprised land without a dwelling house thereon, was continuously held by them and is now held by them. It was the undisputed testimony of Mr. Ludlow that it had been held for years with the express intention on the part of Mrs. Ludlow and himself of returning to Indianapolis in their old age to build a permanent home.

It also appeared in evidence that Mr. Ludlow had for many years paid his poll tax in Indiana. He had also paid his income tax in Indiana, notwithstanding the fact that residents of Washington, D.C., make their payment and returns of income taxes in Baltimore, Md.

Mr. Ludlow testified that he had voted regularly in Indianapolis, Ind., having failed to do so only on two occasions. In 1924 he purchased the home in which he and his family now reside at 1822 H Street NW., Washington, D.C.

In the course of the hearings, the word "residence" is broadly employed. No distinction is made between "legal residence" and "actual residence." The fact is that one's legal residence may be merely ideal following his inhabitancy. His "actual residence," however, must be substantial and constitute an abode or dwelling place for a fixed and permanent time, as contradistinguished from a mere temporary locality of existence. It is a well recognized principle of law that one may abide or have a residence in one State or county and yet retain his legal residence or inhabitancy in another State or county.

It is the view of the committee that the term "inhabitant" as employed in section 2, article 1 of the Constitution, embraces the idea of legal resi-

dence as contradistinguished from actual residence. In other words, it is the view of the committee that one's inhabitancy is where he maintains his ideal residence.

It is commonly accepted that an actual resident may not be entitled to all the privileges or subject to all the duties of an inhabitant. This is clearly so when the individual goes to the trouble of paying his taxes and insisting upon his right to vote in the place of his birth which he claims as his ideal residence. In such a case, one continues to be an inhabitant where he maintains his right to vote, irrespective of his actual residence. In other words, the inhabitancy of the individual is to be determined by his intention as evidenced by his acts in support thereof.

In the case of Mr. Ludlow, it develops that he was excused from jury duty in the District of Columbia, when he made the frank statement to the court that he voted in Indiana. In other words, the court took the view that the actual residence of Mr. Ludlow did not subject him to the ordinary obligations of citizenship, but that those obligations attached where the rights were reserved, namely, in Mr. Ludlow's case, in the State of Indiana.

It is the view of the committee that irrespective of Mr. Ludlow's actual residence in the District of Columbia at the time he ran for election as a Representative to Congress from the seventh district of Indiana, his course of action for years was such as to indicate his intention to retain his ideal residence, namely, his inhabitancy with all the incidental rights of citizenship, in the city of his birth, Indianapolis, Ind.

It is, therefore, the unanimous conclusion of your committee that Ralph E. Updike was not elected a Representative to the Seventy-first Congress from the seventh congressional district of the State of Indiana and is not entitled to a seat therein, and that Louis L. Ludlow was duly elected a Representative to the Seventy-first Congress from the seventh congressional district of the State of Indiana and is entitled to retain his seat therein.

> *Resolved,* That Ralph E. Updike was not elected a Representative to the Seventy-first Congress from the seventh congressional district of the State of Indiana and is not entitled to a seat therein.
>
> *Resolved,* That Louis L. Ludlow was duly elected a Representative to the Seventy-first Congress from the seventh congressional district of the State of Indiana and is entitled to retain his seat therein.

Reported privileged resolution (H. Res. 326) was agreed to by voice vote without debate [74 CONG. REC. 1312, 71st Cong. 3d Sess., Dec. 20, 1930; H. Jour. 111].