

Chapter CLXXII

GENERAL ELECTION CASES, 1926 TO 1930.

1. Cases in the Sixty-ninth Congress. Sections 166–173.
 2. Cases in the Seventieth Congress. Sections 174–180.
 3. Cases in the Seventy-first Congress. Sections 181–185.
-

166. The Pennsylvania election case of Bailey v. Walters, in the Sixty-ninth Congress.

In order to secure a recount before an elections committee, it is necessary to produce tangible evidence to show likelihood of such recount changing the result of the original returns.

Returns made by duly appointed officials are presumed to be correct until impeached by proof of such irregularity and fraud as to raise the presumption of incompetency or dishonesty, and the House will not constitute itself a mere board of recount.

Illegal ballots are subtracted from the vote of the candidate for whom cast and when the candidate for whom cast can not be ascertained are subtracted from the vote of all candidates in accordance with the pro rata share of the total vote obtained by each candidate in the precinct in which cast.

Under a decision of the Supreme Court an American-born woman married to a foreigner prior to the passage of the Cable Act and continuing residence in the United States does not lose citizenship or right to vote by such marriage.

Form of resolution authorizing production of ballots for recount by committee.

A State law providing for custody of ballots was held to be directory and not mandatory.

A question relating to votes cast by unregistered voters was not finally passed upon.

On June 10, 1926,¹ Mr. Bird J. Vincent, of Michigan, from the Committee on Elections No. 2, submitted the report of the committee in the Pennsylvania case of Warren Worth Bailey v. Anderson H. Walters.

At the general election held November 4, 1924, the contestee had a majority of 63 votes over the contestant and received the certificate of election.

¹ First session Sixty-ninth Congress, House Report No. 1450.

However, the law of the State of Pennsylvania approved May 19, 1923, provided:

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.

In compliance with this law, electors in 12 precincts presented petitions charging fraud or mistake and praying for an examination of the ballots of certain precincts, and the case being heard before the three judges as provided by law, the court rendered this opinion:

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 a rehearing was denied and the contestant applied to the Supreme Court for a writ of certiorari which was also denied. Thereupon the contestant filed a notice of contest in the House.

The first question discussed by the committee report is the application of the contestant for a general recount of all the votes of all the precincts of the congressional district. The majority of the committee find that:

No testimony nor proof casting suspicion upon any ballot boxes in the district, nor⁴ the returns from them, was produced except as to the 21 ballot boxes which have been recounted.

and agree that:

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.

Accordingly, the committee reaffirm the statement made in the case of *Ansorge v. Weller* to the effect that:

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 conclude that no cause had been shown why a general recount should be ordered outside of the 21 precincts about which the testimony centers.

The committee having decided to recount the ballots in these precincts, Mr. Bird J. Vincent, of Michigan, by direction of the committee, offered the following resolution in the House:

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.

The resolution was accorded immediate consideration as privileged and was agreed to, and the ballots having been recounted in the sixteenth ward of Johnston City, were found to sustain the contention of the contestant. Accordingly 16 additional votes were allotted to the contestant.

The contestant also claimed 40 additional votes in the St. Michael district, which, in alleged violation of the Pennsylvania law, had been left at the polling place instead of with "the nearest justice of the peace," as required by statute. The committee found, however, that the law was directory and not mandatory and as the ballots were found intact in the box allotted them to the contestant.

The dispute as to votes cast at Westmont Borough hinged on the allegation that ballots had been marked by a peculiar cross different from other crosses on the ballots and the contention that they had been placed on numerous ballots by the same person. On examination of the ballots the committee sustained the contention and recounted the ballots with a resulting gain of 76 votes for the contestee.

As to the allegation that unnaturalized voters had participated in the election, the committee found that women had voted 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 and therefore rejected such votes.

In cases where such voters when questioned testified as to the candidate for whom they had voted the vote was subtracted from the total vote of that candidate. Where such voters refused to testify for whom they had voted, the subtraction was made by reducing the vote of each candidate in the precinct 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.

In this connection the contestant, through his counsel, claimed that an American-born woman who had married a foreigner prior to the Cable Act, but who continued to reside in the United States, did not lose her citizenship thereby. However, as the Supreme Court has passed upon this question, the committee in accordance with that decision rejected such alien votes.

The last question in the contest related to ballots cast by unregistered voters. Proof was submitted that 586 illegal votes had been cast which should not have been counted because vitiated by the law of the State of Pennsylvania denying the right

of franchise to unregistered voters. It was conceded that the law was mandatory and that under the rule fixed by the precedents in Congress such ballots could not be counted if proof was established. But as there was a difference of opinion in the committee as to whether the methods of proof were proper and sufficient, and as the contestee already had sufficient votes for election without such additional votes as might accrue from this source, the committee refrained from expressing an opinion on the question.

Summing up the change of votes resulting from the determination of the various questions involved in the case, the committee found that the contestee had received a majority of 51 votes and recommended 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.

The case was debated at length in the House on June 15,¹ when the resolutions recommended by the committee were agreed to without division.

167. The Florida election case of Brown v. Green, in the Sixty-ninth Congress.

The contestant having withdrawn from the contest, the committee reported a resolution confirming the right of the incumbent to his seat.

On February 24, 1926,² Mr. Charles L. Gifford, of Massachusetts, from the Committee on Elections No. 3, submitted the unanimous report of the committee in the case of H.O. Brown v. Robert A. Green.

The committee reported that the contestant had withdrawn from the contest by a letter duly subscribed and sworn to before a notary public and submitted the following resolution:

Resolved, That Hon. Robert A. Green was duly elected as Representative from the second congressional district of Florida to the Sixty-ninth Congress and is entitled to his seat.

The report was considered on March 12³ and the resolution was agreed to without debate or division.

168. The Georgia election case of Clark v. Edwards, in the Sixty-ninth Congress.

The contestant failing to file a brief within the time required by the rules of the House, the committee construed the laches as an abandonment of the contest.

The committee having reached the conclusion that the contestant was not acting in good faith in bringing the contest announced that it would decline to authorize payment of any expense incurred by the contestant therein.

¹ Record, p. 11307.

² First session Sixty-ninth Congress, House Report No. 359.

³ Record, p. 5471.

On June 10, 1926,¹ Mr. Bird J. Vincent, of Michigan, from the Committee on Elections No. 2, presented a report in the case of *Don H. Clark v. Charles G. Edwards*, of Georgia.

According to the official returns the contestee, as the Democratic candidate, had received 14,694 votes; Herbert G. Aarons, as the Republic candidate, had received 627 votes; and the contestant, appearing on the ballots in the various counties under such headings as "Independent Party" or "Independent Republican Party," had received 448 votes.

The contestant alleges that he was the duly nominated Republican candidate but that he was wrongfully denied that designation on the ballots.

The committee find, however:

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.

Further charges by the contestant are set forth in the report, as follows:

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.

The failure of the contestant to file a brief, as required by the rules of procedure, is thus reported and pawed on:

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.

So impressed are the committee with the lack of merit in the contentions of the contestant and his delay in the prosecution of his claims that they conclude:

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.

¹ First session Sixty-ninth Congress, House Report No. 1449.

The committee therefore recommend resolutions reciting that the contestant was not elected and that the contestee was duly elected, which were adopted by the House on June 15,¹ without debate or division.

169. The New York election case of Sirovich v. Perlman, in the Sixty-ninth Congress.

It being admitted that the contestee had a majority of the votes cast, the committee declined to pass on disputed ballots submitted for their consideration.

The contestant having failed to exercise due diligence in securing evidence within the time allotted, the committee overruled his application that the case be reopened to permit him to adduce further testimony.

On April 12, 1926² Mr. Don B. Colton, of Utah, from the Committee on Elections No. 1, submitted the report of that committee in the case of William I. Sirovich v. Nathan D. Perlman.

According to the official returns the sitting Member had received a plurality of 126 votes. The contestant, however, served notice of contest on numerous grounds, which are summarized by the committee 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.

The contestee having answered with a general denial, the committee subpoenaed the disputed ballots and counted them. At the close of the count so small a number remained in dispute that the committee concluded:

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, the counsel for the contestant made application for the reopening of the case to take further testimony.

The application was denied for the reason that:

The committee found that the contestant had not used due diligence in securing the proper evidence at the time of making his case in chief and therefore did not feel justified in asking the House for authority to reopen the case.

The majority therefore sum up the case:

Your committee 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.

¹Record, p. 11312.

²First session Sixty-ninth Congress, House Report No. 858.

The minority members of the committee, while refraining from submitting minority views, declined to vote to approve the conclusions reached by the majority, for the reason as explained by Mr. C. B. Hudspeth, of Texas, during the debate on the report in the House on April 15.¹

In this contest the contestant did not ask that he be given the seat in the fourteenth congressional district, but his prayer was that the seat now held by Mr. Perlman be declared vacant and void and another election held. I want to state to you frankly, Mr. Speaker, the case was not properly prepared before it was presented to the committee of Congress. I think every man on that committee will agree to that, and counsel for the contestant asked for additional time to produce additional testimony, but under the rules governing contested-election cases and the law it could not be granted.

At the conclusion of the debate, however, the resolutions reported by the majority, declaring that the contestant had not been elected and confirming the title of the contestee to his seat, were adopted without division.

170. The Senate election case of Bursum v. Bratton, from New Mexico, In the Sixty-ninth Congress.

A general recount of ballots is unwarranted without preliminary evidence tending to cast doubt on the accuracy of the official returns.

Counsel for the contestant having conceded that a recount of the ballots was all that was relied on and that if a recount did not overcome the contestee's plurality the contest would be dismissed, the committee held it was not warranted on the pleadings in recounting the ballots but permitted an amendment of pleadings to justify recount.

An instance wherein the committee, overruling a demurrer conceded to be well taken, elected to decide the case on the pleadings, affidavits, exhibits, and statements of counsel and parties.

In 1926,² the Senate investigated the case of Holm O. Bursum. *v.* Sam G. Bratton, of New Mexico.

In the election held November 4, 1924, the official returns gave the contestant 54,558 votes and the contestee 57,335, a plurality of 2,797 votes for the contestee.

The petition in contest contained general averments as follows:

That various employees of the Government and the State, as well as others, voted without possessing the requisite residential qualifications; that residents of the State who were attending schools and colleges therein voted at the places they were attending school instead of their home precincts; that aliens, minors, and ex-convicts were permitted to vote and certain Indians denied the right; that in one county the county clerk failed to comply strictly with the law in the preparation of the official ballots; and that martial law was improperly declared in one county. A general allegation was made that votes cast for contestant, as well as the candidate on the Progressive ticket, were counted for contestee. Other averments of incidental importance were made.

However, in a hearing before the subcommittee, and later before the committee en banc, the attorney for the contestant made the statement:

That a recount of the ballots was all that was relied upon; that the pleading tendered other issues, but that he did not rely upon them, and that if a recount of the ballots did not totally or substantially overcome the contestee's plurality the protest would be dismissed.

¹ Record, p. 7533.

² First session Sixty-ninth Congress, Senate Report No. 724.

On the strength of this statement the subcommittee concluded that:

The pleading filed by the contestant failed to state grounds justifying the committee in taking steps to impound, open, and recount the ballots cast throughout the State, or for further proceedings, but that the matter should be submitted to the full committee for its consideration.

The committee adopted the views of the subcommittee but held that the contestant could, if he so desired, amend his pleading in order to set forth a bill of particulars showing fraud in the count or any pertinent facts expected to be proved sufficient to warrant a recount.

The contestant availed himself of this permission and seven affidavits were presented, together with certain documents, much of which was foreign to the subject and related to matters which could not be determined by a recount of the ballots. Two of such affidavits tended to show fraud committed in three precincts in Curry County. When the substance of the two is combined they charge that in precinct 13, 10 votes were cast for the contestant and counted for the contestee; that in precinct 1, 122 Progressive ballots were scratched for the contestant but counted for the contestee; that in said precinct 85 Democratic ballots were scratched for the contestant but counted for the contestee; that the tallies in said precinct were kept on separate paper from the official poll books; that there is confusion and doubt with reference to the variance between the tallies and the certificate, under one view such variance reaches the maximum of 225, under another view it is 75; that in precinct 9 of said county 50 ballots cast for the contestant were counted for the contestee and that 45 were declared to be mutilated when they should have been counted for the contestant. One of these affiants undertook to state facts occurring in the count at three separate precincts. The other does not purport to know any facts except as to one precinct. This is the only attack made upon the entire State, consisting of 31 counties and approximately 715 precincts.

To these allegations the contestee interposed a demurrer on the ground that, granting they were true, they could not change the result of the election but could only increase the size of his plurality:

Notwithstanding the conceded merit of this contention, the report recites that:

Upon the entire record thus presented the committee concluded to overrule the demurrer and to decide the contest upon the pleadings, affidavits, documents, photographs, admissions, and statements of counsel and the parties.

The committee then conclude:

That under the contention of either party, the contestee has a plurality of the vote east for the office in question. According to the contestant's contention, and giving him credit for everything claimed, such plurality is 1,220; that according to the contestee's contention the facts pleaded by contestant show that such plurality is approximately 2,300.

That all other matters set forth in said contest are of such character that a recount of the ballots would have no bearing whatsoever. Contestant having waived and abandoned an such issues, there remains no other question to be determined.

That the prevailing rule of law throughout the country with regard to a general recount of ballots without some preliminary evidence tending to cast doubt or suspicion upon the correctness of the official returns may be seen from the following, which are merely a part of the many authorities upon the subject.

The report incorporates numerous citations from authorities in support of its conclusions and closes with the finding:

That Sam G. Bratton received a plurality of the votes cast in the election held in the State of New Mexico on November 4, 1924, for the office of United States Senator from said State for a term of six years beginning March 4, A. D. 1925, and is entitled to hold said office and exercise the functions thereof.

On April 30, 1926,¹ the report was considered by the Senate and the recommendation of the committee was approved without debate.

171. The Senate election ewe of Johnson v. Schall, of Minnesota, in the Sixty-ninth Congress.

The Senate is judge of the election and qualification of its Members and judgments of State courts while persuasive are not binding.

On June 7, 1926² Mr. Charles S. Deneen, of Illinois, submitted the report of the Committee on Privileges and Elections "in the matter of the contest and protest in connection with the election of United States Senator from the State of Minnesota, 1924."

The committee reported that at the general election held November 4, 1924, Thomas D. Schall received 388,594 votes, Magnus Johnson received 380,646 votes, and three other candidates received a nominal number of votes.

Subsequently Mr. Johnson filed with the Senate a petition contesting the election of Mr. Schall and incorporating allegations which are summarized by the committee as follows:

(1) That certain violators of the liquor laws were induced to contribute money for the expenses of contestee's campaign by certain persons who were either employed by or were constant visitors at the "Schall political headquarters" at the West Hotel in Minneapolis.

(2) That sums in excess of the amount permitted to candidates for the United States Senate were expended by contestee in violation of the statutes of the United States and of the State of Minnesota.

(3) That false statements about contestant were made by contestee during the campaign for election in violation of the Corrupt Practices Act of Minnesota. That contestee caused the publication of 450,000 copies of a paper called the Minnesota Harpoon, and caused said Harpoon to be unlawfully mailed as second-class matter in the United States post office at Minneapolis.

(4) That said contestee violated the franking law privilege in sending through the mails "millions of copies of speeches and extensions of remarks."

(5) That contestee promised offices and positions for influence and support in his campaign.

(6) That contestee conspired to expend a sum of money in excess of \$50,000 in procuring the election of said contestee.

The committee having subpoenaed witnesses and taken testimony, reported its findings on these charges in this form:

In the opinion of the committee:

(1) The evidence does not show that any violators of the liquor laws were induced to contribute money or did contribute any money for the expenses of contestee's campaign for election or that the contestee received or expended any such funds.

(2) There was no testimony offered to show that contestee expended any money during his campaign for election as United States Senator, or in the primary which preceded it. There was

¹ Record, p. 8482.

² First session Sixty-ninth Congress, Senate Report No. 1021.

no testimony to show that contestee received any money during the campaign preceding the election of November 4, 1924, or at the primary immediately before it.

(4) No testimony was offered in support of the allegation that the franking privilege had been abused.

(5) The testimony does not show that any promises were made of offices or positions in return for influence or support by contestee in his campaign for nomination or election.

(6) The testimony does not support the allegation that contestee conspired to expend a sum of money in excess of \$50,000 or any sum in securing the election of contestee.

As to the third item in the contestant's arraignment charging violation of the corrupt practices act of the State of Minnesota, the committee tabulate the provisions of that law:

(3) Your committee states that said statutes,

(a) Prohibit certain acts and made them grounds for contest or annulment of election.

(b) Give to the defeated candidate or to 25 voters the right to bring an action to contest or annul the election.

(c) Require that such action be brought within 30 days after election.

(d) Require such action to be brought in the district court of the county where contestee resides.

(e) Require such action shall be tried according to law.

(f) "If a candidate for United States Senator be adjudicated guilty, the court, after entering such adjudication, shall forthwith transmit to the presiding officer of the Senate a certificate setting forth such adjudication of guilty."

The committee then find that no contest contemplated by the statute has been filed in the district court of Minnesota where the contestee resides, and further holds that:

The Senate is a judge of the election and qualification of its members and a judgment of a court under the provisions of the Minnesota law referred to would not be binding upon the Senate, but it would have great weight. It should not be expected that the Senate act as a substitute for a district court of that State.

With reference to the allegations relating to the publication of a paper claimed to have been mailed in violation of the postal laws the committee say:

Regarding the publication of the Minnesota Harpoon, the testimony does not support the allegation that contestee published the paper or knew the contents of contestant's Exhibit No. 2; or mailed or caused to be mailed the paper of which contestant's Exhibit No. is a copy, or knew that it was mailed.

Furthermore, the testimony submitted does not create any issue upon the alleged false statements made in speeches or published in the Minnesota Harpoon.

In conclusion the committee unanimously recommend:

That the contest in this case be dismissed and that the protest against the seating of Thomas D. Schall be overruled.

The Senate considered the report on June 16, 1926,¹ and after debate, including a discussion of the case by the contestee, declared Mr. Schall to be "a duly elected Senator of the United States from the State of Minnesota."

172. The Senate election case of Steck v. Brookhart, of Iowa, in the Sixty-ninth Congress.

¹Record, p. 11351.

Instance wherein a stipulation was entered into under which all votes cast at an election were brought to Washington and recounted.

On a recount by the committee the question of rejecting ballots is properly raised when they are received in Washington and before recounting or at least when tabulated, and the motion comes too late after the record has been made and argument heard.

Denial of charges of irregularity or fraud places the burden of proof of such charges on the proponents.

A State law requiring the transportation and preservation of ballots under seal was held to rebut the unsustained presumption that ballots received with broken seals had been tampered with.

In determining issues in a contested election all cases of doubt were resolved in favor of the incumbent, for the reason that he had received the certificate of election.

In 1926¹ the Senate investigated the case of Daniel F. Steck *v.* Smith W. Brookhart, of Iowa.

The State canvassing board found that Mr. Brookhart had received 450,099 votes, a plurality of the votes cast, and a certificate of election was issued to him and he was seated by the Senate.

Three notices of contest or protest were filed—one by Luther A. Bruewer, who received 862 votes in the election and who took no further steps in the contest; one by the Republican State central committee of Iowa, who alleged that the incumbent had obtained votes under a fraudulent representation that he was a Republican, and that he had not been elected; and one by Daniel F. Steck, who filed formal allegations that ballots were cast for him and not counted, that ballots were cast for him and counted for the incumbent, and that illegal votes were counted for the incumbent.

The incumbent answered denying specifically all material charges set out in the various petitions and, the issues being joined, a stipulation for a recount of all the votes cast in the election was entered into by counsel for contestant and incumbent, respectively, as follows:

STIPULATION.

In the Senate of the United States. In the matter of the contest of Daniel F. Steck *v.* Smith W. Brookhart.

Come now the parties to the above-entitled contest, namely Daniel F. Steck, contestant, and Smith W. Brookhart, contestee, and stipulate and agree as follows:

(1) That the above-entitled contest may be immediately referred to the Committee on Privileges and Elections of the Senate of the United States.

(2) That the said contestant and contestee are and will be throughout the course of the Said contest represented by their respective counsel, viz, J. M. Parsons of Des Moines, Iowa, on behalf of the contestant, Daniel F. Steck; and J. G. Mitchell of Des Moines, Iowa, on behalf of the contestee, Smith W. Brookhart.

(3) That certain voters at the general election held on the 4th day of November, A. D. 1924, at which the said contestant and contestee were candidates for the office of Senator of the United States for the State of Iowa in certain counties, hereinafter more specifically enumerated, recorded their votes in mechanical devices known as voting machines.

¹First session Sixty-ninth Congress, Senate Report No. 498.

(4) That voting machines were employed for the said purpose in 18 counties of the said State, viz, Benton, Boone, Calhoun, Clay, Crawford, Des Moines, Dickinson, Dubuque, Franklin, Hardin, Iowa, Jackson, Johnson, Mahasaka, Marshall, Muscatine, Pocahontas, Polk, Scott, Story, and Webster:

(5) That the said voting machines and each and all of them have been kept locked in order that the evidence of the votes cast by means of said machines shall be preserved for the purposes of the said contest, and that the Senate of the United States, through its Committee upon Privileges and Elections, may inform itself as to the verity or otherwise of the returns made by the several election officials, and the regularity or otherwise of the election in so far as it may be determined by the canvass of the votes cast by means of said voting machines.

(6) That it is necessary, in order that the said voting machines may be employed at elections to be held shortly in said counties, and in order further that certain voting machines which are not the property of certain counties, but have been used under a rental contract, may be released, that the said machines be examined at the earliest possible date by a committee appointed by and under the supervision of the Committee on Privileges and Elections of the United States Senate, and to this end it agreed, subject to the approval of the Committee on Privileges and Elections, that three persons shall examine the said voting machines forthwith and report their findings to the said committee, so as to show the votes cast in each precinct, and identify the machine used in each precinct, and the vote shown by each machine.

(7) That a city and school election will be held in the city of Dubuque, county of Dubuque, in said State, on the 7th day of March, A. D. 1925, and that for the purpose of making examination and reporting the votes cast and such other findings by the parties appointed for the said purpose in the said county of Dubuque, and in view of the fact that the Senate is now in session and will be unable to delegate one of the members of the Committee on Privileges and Elections to supervise the examination of the voting machines in the said county of Dubuque, the following persons, representing, respectively, the contestant and contestee, shall, subject to the approval of the said Committee on Privileges and Elections, constitute the counting board authorized to make the said examination in the said Dubuque County—for the contestant, Maurice P. Cahill, of Cedar Rapids; and for the contestee, Louis H. Cook, of the city of Des Moines, Polk County, Iowa.

(8) That the said Maurice P. Cahill and Louis H. Cook may appoint a third member of the said counting board, but if unable to agree upon such member on or before the 28th day of February, A. D. 1925, shall immediately proceed to the examination of the said machines and the counting of the votes therein and make separate report thereof to the Committee on Privileges and Elections of the United States Senate.

(9) That immediately upon the adjournment of the present session of the Senate of the United States, there may be appointed by the Committee on Privileges and Elections one of the members of the said committee, or such other persons as said committee may select, who shall supervise the examination of the said machines and the counting of the votes cast by means thereof, and who shall be present at the opening of each machine for the said examination and counting: *Provided, however,* That the presence of said member of the said committee shall not be necessary at the examination of and counting of the ballots cast by means of machines in Dubuque County.

(10) That the report of each and all the committees or boards appointed for the purpose of examining the said machines, and the counting of the votes cast thereby, shall include any other matters or conditions which may in the opinion of the board or either of its members affect the regularity of the votes cast on the machines themselves.

(11) That there shall be subpoenaed to Washington all absentee ballots, cast by means of said voting machines and rejected ballots, and all registration books, poll books, and other books and documents of every character or kind whatsoever used in connection with the voting machines at the said election.

(12) That the counting board shall, with the county auditor, in each of said counties voting by machines identify each and all of the packages of ballots and the books and other documents so subpoenaed and transmitted, which said identification shall be evidence thereof.

(13) That there shall be subpoenaed and transmitted to the Sergeant at Arms of the Senate of the United States all paper ballots from each and every precinct of the State of Iowa where such

ballots were employed in their original packages as are now in the possession of the several county auditors, together with all registration books, poll books, tally sheets, and other books and documents of every kind and character whatsoever used or employed in connection with the general election held on the 4th day of November, A.D. 1924, aforesaid.

(14) That the packages of ballots and each and all of them transmitted to the Sergeant at Arms shall be identified by the auditor of each and every county and may be further identified by two assistants, one of whom shall represent the contestant and the other the contestee, and the said registration books, poll books, tally sheets, and other books and documents so transmitted shall be similarly identified.

DANIEL F. STECK, *Contestant*.

J. M. PARSONS, *Counsel for Contestant*.

SMITH W. BROOKHART, *Contestee*.

J. G. MITCHELL, *Counsel for Contestee*.

Subsequently this was supplemented by the following second stipulations.

STIPULATION FOR SUBPEONA OF BALLOTS

In the Senate of the United States. In the matter of the contest of Daniel F. Steck against the seating of Smith W. Brookhart in the United States Senate as Senator from Iowa

To the Senate of the United States:

It is hereby stipulated and agreed by and between the parties to the above-entitled contest as follows:

(1) That the Sergeant at Arms of the Senate of the United States shall forthwith address a subpoena to each and all the county auditors of each and every county of the State of Iowa, a list of which said counties with the county seats thereof, the said county seats being the official residences of the said county auditors, is hereto attached, marked "Exhibit A," and made a part hereof.

(2) That the said subpoena shall provide:

(a) That the said county auditors and each of them are commanded to transmit unto the said Sergeant at Arms all of the following books, papers, and documents in their custody used in their respective counties and in each and every precinct thereof in connection with and for the purposes of the general election held in the said State of Iowa on the 4th day of November, A. D. 1924, viz: All registration books, poll books, official canvass books, tally-sheet books, and other books of every kind or character; all paper ballots and their envelopes or other containers; all absentee ballots, together with affidavits made by persons casting their votes by means of such absentee ballots; and all other papers and documents of every kind and character and their envelopes or other containers:

(b) That the said county auditors, so long as the said books, papers, and documents remain in their possession, shall take full charge and custody thereof, and restrain and prevent any and all persons from in any manner interfering or tampering therewith, except as is hereinafter specifically provided:

(c) That immediately prior to the transmission of the said books, papers, and documents the envelopes and containers thereof shall be examined by the county auditor in the presence of a representative of each of the contesting parties, who shall be designated for that duty by the respective counsel for the said parties, and the said examiners and county auditor shall sign their names on each and every envelope or container, which shall be sealed in such manner that they may not be tampered with or opened except by authority of the Committee on Privileges and Elections of the United States Senate without evidence of such tampering or opening appearing thereon. Should there appear any evidence of opening or tampering with any original package prior to the said examination by said county auditor and examiners, notation of the character thereof shall be made upon the envelope or container by the said county auditor and examiners, or either of them.

(d) That the said books, papers, and documents shall, immediately upon their certification as provided in the immediately preceding paragraph (c), be securely packed in substantial cases, the said cases and each of them to be certified in manner and form, so far as applicable, as provided

for individual envelopes and containers, and thereupon forwarded by express to the said Sergeant at Arms at the city of Washington, D. C.

Dated this 30th day of March, A. D. 1925.

DAN F. STECK,
By J. M. PARSONS, *of Counsel*
SMITH W. BROOKHART
By J. G. MITCHELL, *of Counsel*.

Under these stipulations and subsequent agreements all ballots cast in the election were brought to Washington and recounted.

One of the questions rising out of the recount was the charge by the incumbent that ballots reaching Washington with broken seals were subject to the presumption of having been tampered with.

On this contention the committee find as to fact:

It is true that some reached Washington in packages the seals to which had been loosened or broken, but evidently and conclusively this occurred in transporting in the mails. It is contended, however, by counsel for incumbent, that even this condition raised a presumption that they might have been tampered with, or could have been tampered with, and, therefore, that they could not be received.

The committee take the position, however, that:

Inasmuch as the law of Iowa required the election officials to seal and transmit all the ballots, poll books, and tally sheets to the county auditors, and required that the county auditors should keep and preserve them after they were received, it seemed to your committee that this presumption would rebut and overcome the presumption suggested by counsel for incumbent.

In this connection the question as to the burden of proof is thus treated by the committee:

The committee calls attention to the denial in the response of incumbent to all acts of irregularity and fraud set up in the petition of contestant. Therefore, any facts relied upon by incumbent would have to be affirmatively shown.

No evidence was offered to support the suggestion of the incumbent. No acts of fraud were alleged or proved, or were sought to be proved. No witness was introduced to establish such an issue, nor were any pretended to be available.

In fact, counsel for incumbent admitted that he knew of no acts or circumstances, other than the unsealed packages, to sustain such a presumption.

Obviously no burden rested upon the contestant to refute the suggestion of counsel for incumbent. This view is sustained by not only the courts of Iowa but by those of most of the jurisdictions of the United States.

Numerous authorities are cited by the Committee in support of this position and the report continues:

These cases answer the contention of incumbent regarding the absence of proof that the ballots were legally preserved.

A substantial compliance with the laws of Iowa has been shown in this, that the ballots were found in the custody of the various county auditors, the legal custodians of the ballots, and that out of the large number of Iowa precincts in only two do the county auditors show, in compliance with the stipulation of the parties, that there was any defect in the envelopes in which the ballots were contained. This showing makes a prima facie case, and no effort was made by incumbent to amend his pleading or to overturn this presumption.

Under the Iowa law it was not open to incumbent to suggest the existence of a mere possibility that the ballots were tampered with, but he would have been compelled to offer evidence.

showing that the ballots had been in actual point of fact tampered with. That he did not offer to do.

This position is vigorously combated by the minority who insist:

The burden of proof is on the contestant to show that the ballots, when they reached here, were in the same condition as they were in when the judges of election delivered them to the county auditors. This is not a technical objection. It is based upon the statute referred to with reference to the duty of the county auditor in preserving ballots, upon the stipulations agreed upon by the parties, and upon well-known principles of law.

Unless the contestant meets this burden, the official count made by the returning officers, upon which a certificate of election was given to Brookhart, must stand. The certificate of election gives him a prima facie right to a seat in the Senate, and that prima facie right can be overturned only upon positive proof that he did not receive a plurality of the votes.

It is apparent from the face of the record that the law was not complied with in many instances. Two county auditors made a notation on the bags containing the ballots to the effect that they were unsealed at the time they prepared them for mail. Sixty-seven bags of ballots came to Washington unsealed. There were 1,068 precincts in which there was a discrepancy between the number of names on the polling list and the number of ballots found in the boxes when they were counted here. In one precinct, there were 198 missing ballots; in another precinct there were 20 ballots missing. Later, a batch of ballots were sent from that precinct to the committee, thus showing conclusively that the ballots at that precinct had not been kept together and safely preserved as required by statute. These instances of discrepancies and shortages of ballots are referred to, in this connection, only to show that the law was not complied with with reference to the preservation of ballots.

In these circumstances, it can not be said that the contestant has met the burden the law places upon him to prove that the ballots were kept as required by statute and that they are the identical ballots cast at the election. Because of the failure to make such proof, a recount of the ballots should not have been made.

The majority and minority further disagree as to the doctrine of intention of voters. The majority adopt this policy:

In determining for whom the votes included under the remaining classes should be counted, your committee sought to ascertain the true intent of the voters. In reaching this conclusion, it took into consideration every circumstance that might shed any possible light upon such intent. It disregarded all claims put forward to disfranchise the voter, either by a contention that certain marks were distinguishing marks, or that the voter had not complied technically with the provisions of the statute.

And in ascertaining the intent of the voter they are guided by the further rule that:

In any and all cases of doubt the advantage was given the incumbent, because he had the certificate of nomination.

The minority, while tacitly concurring as to the rule followed by the majority in case of doubt, dissent from the "rule of intention of voters" promulgated by the majority:

It is contended by the majority that the "rule of the intention of the voter" should be followed. Grant that, but how is "the intention of the voter" to be determined? The intention of the voter must be found by an examination of his ballot, viewed in the light of the law of the State informing the voter how to mark his ballot.

The majority do not agree to this opinion, and proceed to reach a conclusion without regard to the law aliunde the ballot.

The true rule of law is that if the intention of the voter is manifest from what appears on the face of his ballot, in the light of the law under which it was cast, it must be counted for the candidate for whom it appears to have been cast.

No evidence is permissible to explain a ballot which is unambiguous on its face. Ballots that are ambiguous may be explained by extrinsic evidence.

It will likely be admitted by each member of the majority that under the law of Iowa, these 1,344 votes should be counted for Brookhart. But they are not counted for him because of disaffection in the Republican Party in Iowa and cordial dislike of Brookhart by many members of that party.

So, the majority decided that it had a right to take into consideration this condition and to refuse to count a ballot for Brookhart, which under the law of Iowa he was entitled to have counted for him.

No voter of any of these ballots had testified as to his intention. The majority entered into the broad field of surmise and speculation, and in the face of the law, declared that the voter, although he marked his ballot under the provisions of the law and thus cast a vote for Brookhart, did not intend to do so.

Text writers on "Elections" and cases almost without number support the contention that is made with reference to the legal propositions advanced here. It is not deemed necessary to cite them. Indeed, it is to be doubted whether there can be found any respectable authority to the contrary.

It was stated by the majority in the consideration of the matter in the committee that many of these 1,344 ballots are what is called a "mixed ballot." That does not prevent those from being counted for Brookhart. Sections 812, 814, and 815 of the Iowa Code settle this in his favor.

It is only by holding that a State has no right to pass any law on the subject of voting for a Senator, or if it does enact any such law it shall not be given consideration by the Senate, that the 1,344 votes can be denied Brookhart. Being unable to agree to any such doctrine and being unwilling to disfranchise a voter of Iowa who has followed the law of his State in marking his ballot, I contend that a grave injustice will be done, not only to Brookhart, but to the voters themselves, and that a precedent will be established that may rise up in later times to haunt us and produce a harmful and disastrous effect upon many States to the end that such States may be denied rights given under the Constitution of the United States.

The minority views conclude:

Reviewing the whole matter, it appears:

1. That if no recount should be had, on the face of the returns Brookhart has a plurality.
2. That if a recount should be had in the machine counties and in the precincts where the ballots corresponded with the names on the polling lists, Brookhart has a plurality, irrespective of the 1,344 votes that the committee refused to count for him.
3. That on a proper count of the legal ballots before the committee, in the light of the law of Iowa, Brookhart has a plurality.

Therefore, it is respectfully submitted that he should be declared to be entitled to a seat in the United States Senate as a Senator from the State of Iowa

However, the majority maintain:

Your committee, having found that the contestant, Daniel F. Steck, received a plurality of all the votes cast for United States Senator in the State of Iowa at the election held on November 4, 1924, and that the incumbent, the Hon. Smith W. Brookhart, did not receive a majority of the votes cast at said election, it therefore recommends that the Senate shall declare that the Hon. Smith W. Brookhart was not elected a Senator from the State of Iowa at the election held

on November 4, 1924, and is not entitled to a seat as a Senator from said State, but that the Hon. Daniel F. Steck did receive a plurality of the votes cast for United States Senator from said State at the said election, and is entitled to a seat as a Senator from said State.

In conformity with this finding the following resolution was offered in the Senate, and taken up for consideration on April 6.¹

Resolved, That Daniel F. Steck is hereby declared to be a duly elected Senator of the United States from the State of Iowa for the term of six years, commencing on the 4th day of March, 1925, and is entitled to be seated as such.

To this resolution the following substitute was proposed:

Resolved, That Smith W. Brookhart is hereby declared to be a duly elected Senator of the United States from the State of Iowa for the term of six years, commencing on the 4th day of March, 1925, and is entitled to a seat as such.

Debate continued intermittently until April 12, when the substitute was rejected and the resolution was agreed to without amendment, yeas 45, nays 41.

173. The Senate election case of Gerald P. Nye, from North Dakota, in the Sixty-ninth Congress.

Instance wherein the Senate, overruling the recommendation of its committee, seated a Senator designate whose credentials the committee had reported to be invalid.

The sufficiency of authorization conferred by a State statute on the State executive to appoint a United States Senator under the provisions of the seventeenth amendment to the Constitution.

A resolution determining title to a seat in the Senate raises a question of the highest privilege and takes precedence over any other order.

On January 4, 1926,² Mr. Guy D. Goff, of West Virginia, on behalf of the Committee on Elections and Privileges, proposed to submit the following resolution:

Resolved, That Gerald P. Nye is not entitled to a seat in the Senate of the United States as a Senator from the State of North Dakota.

Mr. C. C. Dill, of Washington, rising simultaneously, claimed the floor in debate.

The Vice President³ recognized Mr. Goff and said:

The Secretary will read the resolution reported by the Senator from West Virginia. It relates to a question of the highest privilege and takes precedence over any other order.

Mr. Nye had presented credentials in regular form certifying to his appointment by the Governor of the State of North Dakota to fill a vacancy, and the question in the case turned on the governor's authority to fill the vacancy under the State law, and the interpretation of the provisions and requirements of the seventeenth amendment to the Constitution of the United States in construing that law.

¹ Record, pp. 6859–7281.

² First session Sixty-ninth Congress, Record, p. 1408.

³ Charles G. Dawes, Vice President.

The act of March 15, 1917, chapter 249 of the Laws of the State of North Dakota, provided:

Be it enacted by the Legislative Assembly of the State of North Dakota:

(1) That section 696 of the Compiled Laws of North Dakota for 1913 be amended and reenacted to read as follows:

696. Vacancies, how filled: All vacancies, except in the office of a member of the legislative assembly, shall be filled by appointment as follows:

1. In the office of State's attorney in which a vacancy has occurred by reason of removal under section 695 of the Compiled Laws of North Dakota for the year 1913, by the board of county commissioners by and with the advice and consent of the governor.

2. In county and precinct offices by the board of county commissioners, except vacancies in such board.

3. In offices of civil townships, by the justices of the peace of such township, together with the board of supervisors or a majority of them, and if a vacancy occurs from any cause in the board of supervisors, the remaining member of the board shall fill such vacancy.

4. In State and district offices by the governor.

(2) All sets or sections in conflict herewith are hereby repealed.

In the report of the Committee on Privileges and Elections, filed on December 16, 1925,¹ the majority took the view that the authority conferred by the statute was insufficient.

The majority say:

The act of March 15, 1917, *supra*, does not refer expressly or by implication to the office of United States Senator, and does not in the language used, in the light of the history of the act, disclose a clear legislative intent to incorporate into the laws of the State of North Dakota the provisions of the seventeenth amendment to the Constitution of the United States. Nowhere is express reference made to the Constitution of the United States, and nowhere in said act does the language used indicate that the Legislature of the State of North Dakota had the seventeenth amendment to the Constitution of the United States in mind when the act of March 15, 1917, *supra*, was passed. Certainly the reasonable presumption is that if the Legislature of North Dakota had intended to incorporate into the act of March 15, 1917, *supra*, the provisions of the seventeenth amendment to the Constitution of the United States, it would have given the executive of that State the power, as the seventeenth amendment provides, to make a temporary appointment only, until the people should fill the vacancy by election, and would not have given the executive power to fill the vacancy. The act of March 15, 1917, *supra*, in so far as it can be held by construction and intent to confer upon the executive of the State of North Dakota, the power to make a temporary appointment, is in conflict with the seventeenth amendment to the Constitution of the United States, because it expressly, if it confers any power in the case of a United States Senator, confers the power to fill a vacancy, not the power to make a temporary appointment. It is only reasonable to assume that the Legislature of North Dakota would have noted the language employed in the applicable provisions of the seventeenth amendment to the United States Constitution and would, by the use of apt language, have conferred upon the executive the power to make temporary appointments in the case of a vacancy in the office of United States Senator and would not have premeditatedly exceeded the authority delegated and the power conferred to fill vacancies.

The majority also fail to find authorization for the appointment of a United States Senator in the constitution of the State of North Dakota. The report says:

Obviously it can not be logically and legally asserted that the affirmative legislation contemplated by the seventeenth amendment can be found in the provisions of a constitution adopted and

¹First session Sixty-ninth Congress, Senate Report No. 3.

ratified in 1889, approximately 24 years before the adoption of the seventeenth amendment to the United States Constitution. Then, again the power of the executive under section 78 of the constitution of North Dakota is limited to cases where "no mode is provided by the constitution or law for filling such vacancy." A mode for filling a senatorial vacancy, assuming the constitutional provision to be applicable, has been expressly provided by the seventeenth amendment to the Constitution of the United States, which is concededly the supreme law of the land, and which the Governor of the State of North Dakota is compelled to support. This amendment, in the absence of legislative action empowering him to make a temporary appointment, commands him to issue writs of election.

The majority therefore conclude:

It is therefore respectfully submitted that neither section 78 of the constitution of North Dakota nor the act of March 15, 1917, conferred any authority upon the executive of North Dakota either to make a temporary appointment or to fill a vacancy in the office of United States Senator by appointment; and that the Legislature of the State of North Dakota has not by due legislation conferred upon the governor of that State such appointive power as was delegated to it by the seventeenth amendment to the United States Constitution.

The minority, while dissenting sharply from the conclusion of the majority, differ as to the line of reasoning leading to that opinion.

Debate on the resolution continued on January 7, 8, 9, 11, and 12, when the Senate agreed, yeas 41, nays 39, to a substitute proposed by Mr. Hubert D. Stephens, of Mississippi, in the following form:

Resolved, That Gerald P. Nye is entitled to a seat in the Senate of the United States as a Senator from the State of North Dakota.

Thereupon Mr. Nye took the oath and assumed his seat in the Senate.

174. The election case of James M. Beck, of Pennsylvania, in the Seventieth Congress.

The right of a Member elect to take the oath being challenged, the Speaker directed him to stand aside temporarily.

The oath having been administered to other members elect, a resolution relating to the election of a Member elect temporarily denied administration of the oath was entertained as a matter of the highest privilege.

Discussion of the term "inhabitant" as a constitutional qualification for membership in the House.

Instance wherein the question of qualification was passed on after a Member elect had been sworn in on his prima facie showing.

A Member renting an apartment June 1, 1926, in the State from which elected November 6, 1926, and occupying it "one or more times each week" was held to be qualified, although owning at the time a summer home in another State and owning and maintaining a residence in the District of Columbia.

On December 5, 1927,¹ the Speaker² directed the Clerk to call the roll by States for the administration of the oath of office to Members and Delegates.

¹ First session Seventieth Congress, Record, p. 8.

² Nicholas Longworth, of Ohio, Speaker.

The State of Pennsylvania had been reached and the name of Mr. James M. Beck, of Pennsylvania, was called, when Mr. Finis J. Garrett, of Tennessee, rising in his place said:

Mr. Speaker, I object to the oath at this time being administered to Mr. James M. Beck, a Representative elect from the State of Pennsylvania, upon the ground that there is a question as to his eligibility under the Constitution of the United States, there being a question as to whether he was an inhabitant of the State of Pennsylvania at the time of his election, as is required by the Constitution. Later I shall present a resolution upon the subject.

The Speaker directed:

The Chair asks the gentleman from Pennsylvania to temporarily step aside.

The call of the roll having been resumed and completed, Mr. Garrett offered as privileged, the following 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 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, and the yeas and nays being ordered, it was decided in the negative, yeas 159, nays 245. So the previous question was refused.

Mr. Bertrand H. Snell, of New York, then proposed as a substitute:

Resolved, That the gentleman from Pennsylvania, Mr. Beck, be now permitted to take the oath of office.

The substitute was agreed to and, the resolution as amended having been adopted, Mr. Beck came forward and took the oath.

Following the organization of the House, Mr. Garrett offered this resolution which was entertained as privileged and agreed to:

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.

On March 17, 1928,¹ Mr. Bird J. Vincent, of Michigan, from the Committee on Elections No. 2 submitted its report.

The report points out that the sole question raised is whether Mr. Beck at the time of his election was an inhabitant of Pennsylvania within the purview of paragraph 2 of section 2, Article I of the Constitution of the United States. No other issued is involved.

The report finds as to facts that Mr. Beck was born in Pennsylvania and resided there continuously until 1900 when he removed to Washington, D. C., and later to New York City, returning in 1920 to Washington where he established his residence and purchased a home which he still owns. On June 1, 1926, he leased an apartment in Philadelphia, which he "occupied one of more times each week."

The report also shows that from 1924, when he voted in New York, he did not vote again until in Philadelphia in September, 1927; that he paid a poll tax of 25 cents in Philadelphia in September, 1927, but has paid his income taxes in Washington; that he has maintained membership in social and civic organizations in Pennsylvania but is carried on the roll of all but one as a nonresident member; that he has registered in hotels as residing at Washington and that his automobiles carry license plates issued by the District of Columbia.

The report quotes the entire debate from the Madison Papers attending the adoption of the clause requiring residence in the State as a qualification for membership in Congress, and deduces:

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 chose, 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.

The majority hold:

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 frames 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,

¹House Report No. 975.

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.

The majority therefore conclude:

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 minority place an entirely different interpretation on the account given in the Madison papers and note that:

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.

Continuing its application to the pending case, the minority say:

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:

"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."

The report was taken up for consideration in the House on January 8.¹ At the conclusion of the debate a substitute resolution offered by Mr. Gordon Browning, of Tennessee, denying Mr. Beck's title to his seat was rejected, yeas 78, nays 248, and the resolution, declaring him "entitled to a seat in the Seventieth Congress as a Member of the House of Representatives from the first congressional district of the State of Pennsylvania", was agreed to.

175. The Kansas election case of Clark v. White, in the Seventieth Congress.

¹ Record, p. 1351.

Contestant having failed to serve notice of contest within the prescribed time, the committee recommended that the case be dismissed.

The committee exercises its discretion as to the amount of fees allowed in contested-election cases.

On February 21, 1928,¹ Mr. Don B. Colton, of Utah, presented the report of the Committee on Elections No. 1 in the Kansas case of *W. H. Clark v. Hays B. White*.

The official returns gave contestant 31,065 votes and contestee 31,159 votes, a plurality of 94 votes for the sitting Member.

The pleadings in the case are summarized in the report as follows:

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 laches, 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.

The committee therefore finds:

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 recommend the usual resolutions declaring that the contestant was not elected and that the contestee was elected and is entitled to his seat.

In the course of the debate on the report in the House on February 23² Mr. Colton, the chairman of the committee, referred to the fees asked in the case and said:

The committee feels that we should take this occasion to say that the fees in this case are allowed as we believe a fair and impartial judge would allow such fees for the actual services rendered. In this case, particularly on one side, there appears to have been very little work done, and yet a claim was submitted for more than the entire amount authorized by Congress. The committee has not allowed the amount that was claimed. We went over the matter carefully and allowed what we believed was a fair compensation for the work which was done; in fact, I believe it is a generous allowance, and yet it is less than one-half of the amount that was claimed. We expect to follow the practice of allowing a reasonable fee only, and that for service actually rendered.

Mr. Edward E. Eslick, of Tennessee, the ranking minority member of the committee, corroborated:

We took up the question of fees and costs, as the chairman has said, just as an impartial judge would. This case was not viewed from the political standpoint, but in order that fairness might be done between the Government on the one hand and the contestant and the contestee on the other, both as to fees and expense account.

There was no difference of opinion between the individual members of the committee and after going over and carefully investigating the expense items and the labor performed by the attorneys, this report comes to the House as a unanimous report, both on the seating of Mr. White and on the question of expenditures.

¹ First session Seventieth Congress. House Report No. 717.

² Record, p. 3546.

The resolutions recommended by the committee were unanimously agreed to.

176. The New York election case of Hubbard v. LaGuardia, in the Seventieth Congress.

The contestant having withdrawn from the contest by letter duly certified, the committee reported a resolution confirming the title of the sitting Member.

On February 28, 1929,¹ Mr. Don B. Colton, of Utah, from the Committee on Elections No. 1, submitted the report of that committee on the case of Hubbard v. LaGuardia, in form, as follows:

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.

On March 1² the resolution was agreed to by the House without debate or division.

177. The West Virginia election case of Taylor v. England, in the Seventieth Congress.

An instance wherein irregularity of pleading as to time of filing was waived by consent of other party.

The House in adjudicating contested-election cases is not bound by State statutes prescribing details of election procedure.

On April 9, 1928³ Mr. Charles L. Gifford, of Massachusetts, submitted the report of the Committee on Elections No. 3, in the election case of J. Alfred Taylor v. E. T. England, of West Virginia.

On the basis of the official returns, the incumbent had received a plurality of 217 votes.

The grounds of the contest as set forth by the contestant and briefed by the committee were—

(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.

Irregularity in the pleadings is thus treated in the report:

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,

¹ First session Seventieth Congress, House Report No. 787.

² Record, p. 3862.

³ First session Seventieth Congress, House Report No. 1181.

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.

After a full consideration of the issues thus presented the committee agreed unanimously that—

(1) 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.

(2) 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.

In accordance with these findings the committee agree:

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.”

The resolution submitted by the committee was unanimously adopted by the House on April 12,¹ without debate.

178. The Minnesota election case of Wefald v. Selvig in the Seventieth Congress.

Instance wherein the contestant having failed to file testimony, the case abated.

The contestant having failed to prosecute his case according to law or to take testimony, the House took no further notice of his claim.

On December 14, 1927,² the Speaker laid before the House a communication from the Clerk transmitting papers in the contested-election case of Knud Wefald v. C. G. Selvig, of Minnesota, as follows:

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 received 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.

The case was referred to the Committee on Elections No. 2, and no further record appears.

¹ Record, p. 6298.

² First session Seventieth Congress, Record, p. 664.

179. The Senate election case of Frank L. Smith, of Illinois, in the Seventieth Congress.

Refutation of the doctrine that neither the Senate nor its committees have jurisdiction to pass upon the qualifications of a Senator elect prior to the administration of the oath of office.

Instance wherein the Senate declined to seat one whose election was declared to be tainted with fraud and corruption.

A candidate in whose behalf exorbitant sums of money were received and dispensed by personal agents and representatives with his knowledge and consent was held to be disqualified.

Instance wherein a Senator rising in his place objected to the swearing in of a Senator elect and offered resolution authorizing appointment of a committee to determine his qualifications and eligibility.

On December 16, 1926,¹ Mr. Henry F. Ashurst, of Arizona, rising in his place in the Senate, said:

Mr. President, I send to the desk a resolution and I ask that the same be read. Telegraphic dispatches announce that the Governor of Illinois has appointed Mr. Frank L. Smith to be a Senator of the United States from the State of Illinois to fill the vacancy created by the death of former Senator William B. McKinley. It is difficult to believe that Mr. Smith, under the circumstances, and in view of the testimony and record in the case, will accept this appointment.

I ask that the resolution be read and lie on the table.

The Clerk read:

Resolved, That the qualifying oath be not administered to Hon. Frank L. Smith, the Member designate, and that the special committee appointed under and by authority of Senate Resolution 195, Sixty-ninth Congress, first session, be, and it hereby is, directed to report to the Senate at the earliest convenient date such recommendations in the premises as may to said special committee seem warranted.

The resolution was ordered to lie on the table.

On January 18, 1927² Mr. Charles S. Deneen, of Illinois, sent to the desk the credentials of Mr. Smith certifying to his appointment as Senator from the State of Illinois by the governor of that State to fill a vacancy and submitted the following resolutions:

Whereas Frank L. Smith, claiming to be a Senator from the State of Illinois, has presented his credentials, which are regular and in due form, and there being no contestant for the seat: Therefore be it

Resolved, That the oath of office be now administered to the said Frank L. Smith: Be it further

Resolved, That his credentials and all charges which may be filed against him and all objections that may be raised as to his right to a seat in the Senate be, and the same are hereby, referred to the Committee on Privileges and Elections, and that committee is hereby directed to hear and determine all charges and objections which may be submitted and to report to the Senate after due inquiry and as early as convenient.

¹ Second session Sixty-ninth Congress, Record, p. 554.

² Record, p. 1911.

In support of the resolution Mr. Deneen argued that in accordance with the precedents a Senator designate presenting proper credentials must be sworn in before consideration could be given to any question of qualifications.

However, after extended debate, the Senate overruled that contention and agreed to a substitute proposed by Mr. James A. Reed, of Missouri, in the following form:

Resolved, That the question of the prima facie right of Frank L. Smith to be sworn in as a Senator from the State of Illinois, as well as his final right to a seat as such Senator, be referred to the Committee on Privileges and Elections; and until such committee shall report upon and the Senate decide such question and right, the said Frank L. Smith shall not be sworn in or be permitted to occupy a seat in the Senate.

The said committee shall proceed promptly and report to the Senate at the earliest possible moment.

The report¹ of the committee was submitted on the last day of the session and reported briefly that:

Owing to the illness of Mr. Smith, the committee was unable to complete its hearings and the matter is now pending before your committee.

On the first day² of the succeeding Congress, when Mr. Smith, having filed credentials certifying to his election, presented himself to take the oath, Mr. George W. Norris, of Nebraska, objected and offered resolutions concluding with the following:

Resolved, That the claim of the said Frank L. Smith to a seat in the United States Senate is hereby referred to the said special committee of the Senate, with instructions to grant such further hearing to the said Frank L. Smith, and to take such further evidence on its own motion as shall be proper in the premises, and to report to the Senate at the earliest possible date; and that until the coming in of the report of said committee and until the final action of the Senate thereon the said Frank L. Smith be, and he is hereby, denied a seat in the United States Senate: Provided, That the said Frank L. Smith shall be accorded the privileges of the floor of the Senate for the purpose of being heard touching his right to receive the oath of office and to membership in the Senate.

After debate extending through several days the Senate agreed to the resolutions on December 7, 1927—yeas 53, nays 28.

Mr. Reed, from the special committee to which the case was thus referred, submitted the report of the committee on January 17, 1928.³

The report thus tersely disposes of the question of jurisdiction of the Senate prior to the administration of the oath of office:

The attorney general of Illinois, State Senator Dailey, and Mr. Smith all took the position that until and unless Mr. Smith was sworn in as a United States Senator neither the special committee nor any regular committee of the Senate, nor the Senate itself, had the power or jurisdiction to pass upon the qualifications of Mr. Smith, or to take any action whatsoever in relation to his claim to a seat.

It will be observed that nothing was presented by Mr. Smith or on his behalf which has not in substance been heretofore presented upon the floor of the Senate. He offered no new evidence; he presented no new argument; he simply stood upon the claim that the committee and the Senate were alike without jurisdiction to consider and pass upon his right to a seat in the Senate until it shall have first seated him as a Senator.

¹Second session Sixty-ninth Congress, Senate Report No. 1717.

²First session, Seventieth Congress, Record, p. 3.

³First session, Seventieth Congress, Senate Report No. 92.

The committee disregard this contention and recommend the adoption of resolutions which after slight modification, were agreed to by the Senate on January 19, 1928, as follows:

Whereas on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate, and the employment of certain other corrupt and unlawful means to secure such nomination or election.

Whereas said committee in the discharge of its duties notified Frank L. Smith, of Illinois, then a candidate for the United States Senate from that State, of its proceeding, and the said Frank L. Smith appeared in person and was permitted to counsel with and be represented by his attorneys and agents

Whereas the said committee has reported

That the evidence without substantial dispute shows that there was expended directly or indirectly for and on behalf of the candidacy of the said Frank L. Smith for the United States Senate the sum of \$458,782; that all of the above sum except \$171,500 was contributed directly to and received by the personal agent and representative of the said Frank L. Smith with his full knowledge and consent; and that of the total sum aforesaid there was contributed by officers of large public service institutions doing business in the State of Illinois or by said institutions the sum of \$203,000, a substantial part of which sum was contributed by men who were nonresidents of Illinois, but who were officers of Illinois public-service corporations.

That at all of the times aforesaid the said Frank L. Smith was chairman of the Illinois Commerce Commission, and that said public-service corporations commonly and generally had business before said commission, and said commission was, among other things, empowered to regulate the rates, charges and business of said corporations.

That by the statutes of Illinois it is made a misdemeanor for any officer or agent of such public-service corporations to contribute any money to any member of said commission, or for any member of said commission to accept such moneys upon penalty of removal from office.

That said Smith has in no manner controverted the truth of the foregoing facts, although full and complete opportunity was given to him, not only to present evidence but arguments in his behalf; and

Whereas the said official report of said committee and the sworn evidence is now and for many months has been on file with the Senate, and all of the said facts appear without substantial dispute Now therefore be it

Resolved, That the acceptance and expenditure of the various sum of money aforesaid in behalf of the candidacy of the said Frank L. Smith is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government, and taints with fraud and corruption the credentials for a seat in the Senate presented by the said Frank L. Smith; and be it further

Resolved, That the said Frank L. Smith is not entitled to membership in the Senate of the United States, and that a vacancy exists in the representation of the State of Illinois in the United States Senate.

180. The Senate election case of William B. Wilson v. William S. Vare, of Pennsylvania, in the Seventieth Congress.

A Senator elect, challenged as he was about to take the oath, stood aside upon the suggestion of the Vice President.

An instance wherein the Senate declined to permit the oath to be administered to a Senator-elect pending the examination of his qualifications.

The right of a Senator elect to take the oath having been denied pending an investigation, the Senate by resolution conferred on him the privilege of appearing on the floor in his own behalf.

The consideration of an election case is a matter of the highest privilege.

Instance wherein the Senate condemned the excessive use of money in a primary election.

The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress.¹

A select committee created during a previous Congress was declared by resolution to have continued in full force and operation during the interim between the two Congresses.

On May 19, 1926,² the Senate agreed to a resolution providing for the appointment of a select committee to investigate expenditures in Senatorial primaries and general elections. This resolution³ was subsequently supplemented by the passage of the following:

Whereas William B. Wilson, of the State of Pennsylvania, has presented his petition to the Senate of the United States contesting the election of William S. Vare as a Senator from Pennsylvania in the election held on the 2d day of November, 1926; and

Whereas the said William B. Wilson charges in his petition fraudulent and unlawful practices in connection with the nomination and in connection with the alleged election of the said Vare as Senator from the State of Pennsylvania, and that unless preserved for the use of the Senate certain evidence relating to said charges and said election will be lost or destroyed; and

Whereas the special committee of five organized under Senate Resolution Numbered 195, Sixty-ninth Congress, first session, by direction of the Senate has entered upon an investigation pertaining to alleged corrupt practices in the election held November 2, 1926, and in the primary preceding it in the State of Pennsylvania: Therefore be it

Resolved, That the special committee of five constituted under Senate Resolution Numbered 195, Sixty-ninth Congress, first session, in addition to and not in detracton from the powers conferred in said resolution, be, and it is hereby, authorized and empowered:

(1) To take possession, in the presence of the said William S. Vare or his representative if the said William S. Vare desires to be present or to have a representative present, and preserve all ballot boxes and other containers of ballots, ballots, return sheets, voters' check lists, tally sheets, registration lists and other records, books, and documents used in said senatorial election held in the State of Pennsylvania on the 2d day of November, 1926.

(2) To take and preserve all evidence as to the various matters alleged in said petition, including any alleged fraud, irregularity, unlawful expenditure of money, and intimidation of voters or other acts or facts affecting the result of said election. Sixty-ninth Congress, first session, with respect to the subject matter of that resolution.

(3) That said committee is hereby vested with all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195.

(4) That the Sergeant at Arms of the Senate and his deputies are directed to attend the said special committee and to execute its directions. That the said special committee may appoint subcommittees of one or more members with power and authority to act for the full committee in taking possession of evidence and in the subpoenaing of witnesses and taking testimony.

Resolved further, That the expenses incurred in carrying out this resolution shall be paid from the contingent fund of the Senate upon vouchers ordered by the committee or any subcommittee thereof and approved by the chairman of the committee, the cost of same not to exceed \$15,000 in addition to the moneys heretofore authorized to be expended.

¹ See sec. 4544 of Hinds' Precedents.

² First session Sixty-ninth Congress, Record, p. 9677.

³ Second session Sixty-ninth Congress, Record, p. 1413.

The committee thus created failing to conclude its investigations, and a question having arisen as to the continuance of the authority of the committee beyond the expiration of the Congress, Mr. James A. Reed, of Missouri, on December 12, 1927,¹ offered the following resolution, which was agreed to, yeas 58, nays 21:

Resolved, That Senate Resolutions Numbered 195, 227, and 258 of the Sixty-ninth Congress, first session, and Senate Resolution Numbered 324 of the Sixty-ninth Congress, second session, be, and they hereby are, continued in force during the interim between the Sixty-ninth Congress and the Seventieth Congress and thereafter until the 30th day of December, 1927.

That the special committee created pursuant to Senate Resolution Numbered 195 of the Sixty-ninth Congress, first session, is authorized in its discretion, and/or at the request of either William S. Vare or William B. Wilson, to open any or all ballot boxes and examine and tabulate any or all ballots and scrutinize all books, papers, and documents which are now in its possession, or any that shall come into its possession, concerning the general election held in the State of Pennsylvania on the 2d day of November, 1926.

On December 5, 1927² while Senators were being sworn in, the name of Mr. Vare was called, whereupon Mr. George W. Norris, of Nebraska, rising to a question of privilege, objected to administration of the oath to Mr. Vare and offered, as privileged, a resolution declaring him not entitled to a seat in the Senate.

Mr. Charles Curtis, of Kansas, having requested that Mr. Vare stand aside until the oath should have been administered to Senators against whom there were no objections, the Vice President³ said:

Without objection, the resolution will lie over, and the Senator elect from Pennsylvania win stand aside.

The resolutions proposed by Mr. Norris were considered at intervals and on December 9,⁴ were agreed to in the following form:

Whereas on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate, and the employment of certain other corrupt and unlawful means to secure such nomination or election; and

Whereas said committee, in the discharge of its duties, notified William S. Vare, of Pennsylvania, then a candidate for the United States Senate from that State, of its proceeding and the said William S. Vare appeared in person and by attorney before said committee while it was engaged in making such investigation; and

Whereas the said committee has reported the evidence which without substantial dispute shows that at the primary election at which the said William S. Vare is alleged to have been nominated as a candidate for the United States Senate, there were numerous and various instances of fraud and corruption in behalf of the candidacy of the said William S. Vare, and that there was spent in behalf of the said William S. Vare in said primary election, by the said William S. Vare and his friends, a sum of money exceeding \$785,000; and

Whereas the said William S. Vare has in no manner controverted the truth of the foregoing facts, although full and complete opportunity was given him, not only to present evidence but arguments in his behalf; and

Whereas the said official report of said committee and the sworn evidence taken by said committee is now and for many months has been on file in the Senate, and all of the said facts appear without substantial dispute; and

¹ First session Seventieth Congress, Record, p. 488.

² First session Seventieth Congress, Record, p. 4.

³ Charles G. Dawes, of Illinois, Vice President.

⁴ First session Seventieth Congress, Record, p. 337.

Whereas on the 10th day of January, 1927, there was filed in the Senate an official communication from the then Governor of Pennsylvania, made and delivered to the Senate in pursuance of law, the following certificate:

COMMONWEALTH OF PENNSYLVANIA,
GOVERNOR'S OFFICE,
Harrisburg, January 8, 1927.

The PRESIDENT OF THE SENATE OF THE UNITED STATES,

Washington, D.C.

SIR: I have the honor to transmit herewith the returns of the election of United States Senator held on November 2, 1926, as the law of this Commonwealth directs.

I have the honor also to inform you that I have to-day signed and by registered mail delivered to Honorable William S. Vare a certificate which is as follows:

"To the PRESIDENT OF THE SENATE OF THE UNITED STATES:

"This is to certify that on the face of the returns filed, in the office of the secretary of the Commonwealth of the election held on the 2d day of November, 1926, William S. Vare appears to have been chosen by the qualified electors of the State of Pennsylvania a Senator from said State to represent said State in the Senate of the United States for the term of six years beginning on the 4th day of March, 1927."

The form of words customarily used for such certificates by the governors of this Commonwealth and the form recommended by the Senate of the United States both include certification that the candidate in question has been "duly chosen by the qualified electors" of the Commonwealth.

I can not so verify, because I do not believe that Mr. Vare has been duly chosen. On the contrary, I am convinced, and have repeatedly declared, that his nomination was partly bought and partly stolen, and that frauds committed in his interest have tainted both the primary and the general election. But even if there had been no fraud in the election, a man who was not honestly nominated can not be honestly entitled to a seat.

The stealing of votes for Mr. Vare, and the amount and the sources of the money spent in his behalf, make it clear to me that the election returns do not in fact correctly represent the will of the sovereign voters of Pennsylvania.

Therefore, I have so worded the certificate required by law that I can sign it without distorting the truth.

I have the honor to be, sir,

Very respectfully yours,

GIFFORD PINCHOT, *Governor.*

Now, therefore be it

Resolved, That the expenditure of such a large sum of money to secure the nomination of the said William S. Vare as a candidate for the United States Senate prima facie is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of a free government, and, together with the charges of corruption and fraud made in the report of said committee, and substantiated by the evidence taken by said committee, and the charges of corruption and fraud officially made by the Governor of Pennsylvania, prima facie taints with fraud and corruption the credentials of the said William S. Vare for a seat in the United States Senate; and be it further

Resolved, That the claim of the said William S. Vare to a seat in the United States Senate is hereby referred to the said special committee of the Senate, with instructions to grant such further hearing to the said William S. Vare and to take such further evidence on its own motion as shall be proper in the premises, and to report to the Senate within sixty days if practicable; and that until the coming in of the report of said committee and until the final action of the Senate thereon the said William S. Vare be, and he is hereby, denied a seat in the United States Senate: *Provided*, That the said William S. Vare shall be accorded the privileges of the floor of the Senate for the purpose of being heard touching his right to receive the oath of office and to membership in the Senate.

The special committee thus authorized submitted a partial report on December 22, 1926,¹ and on February 22, 1929² after lengthy investigations, presented a final report which charged fraud and concluded:

It is respectfully submitted that the evidence as to fraud and corruption in the primary election stands as it did when the committee filed its partial report with the Senate; and that Mr. Vare and his attorneys have failed to rebut the findings of the committee touching the election records.

In the meantime, on January 8, 1927³ and again on March 4⁴ William B. Wilson had protested the election of Mr. Vare and the contest had been referred to the Committee on Privileges and Elections, which submitted a majority report on December 4, 1929,⁵ declaring Mr. Wilson was not elected and that Mr. Vare had—received a plurality of the legal votes cast at the general election held on November 2, 1926, for the office of the United States Senate from the State of Pennsylvania.

The report was filed and no further action was taken thereon.

On September 9, 1929,⁶ Mr. Norris proposed a resolution reviewing the proceeding and denying the contestee a seat in the Senate.

Mr. James E. Watson, of Indiana, raised a question as to the privilege of the resolution.

The Vice President⁷ held:

If the question were submitted to the Chair, the Chair would hold that the matter is of the highest privilege, and under the rule should be disposed of at once.

The resolution was exhaustively debated and on December 6, 1929,⁸ was agreed to, yeas 58, nays 22, in this form:

Whereas on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the United States Senate and the employment of certain other corrupt and unlawful means to secure such nomination or election; and

Whereas said committee, in the discharge of its duties, notified William S. Vare, of Pennsylvania, then a candidate for the United States Senate from that State, of its proceedings, and the said William S. Vare appeared in person and by attorney before said committee while it was engaged in making such investigation; and

Whereas the said committee, in its report to the Senate (Rept. No. 1197, pt. 2, 69th Cong.), found that the evidence, without substantial dispute, showed that at the primary election at which the said William S. Vare was alleged to have been nominated as a candidate for the United States Senate there were numerous and various instances of fraud and corruption in behalf of the candidacy of the said William S. Vare; that there was spent in behalf of the said William S. Vare in said primary election, by the said William S. Vare and his friends, a sum of money exceeding \$785,000; and that the said William S. Vare had in no manner controverted the truth of the foregoing facts, although full and complete opportunity had been given him not only to present evidence but arguments in his behalf; and

¹ Second session Sixty-ninth Congress, Senate Report No. 1197, part 2.

² Second session Seventieth Congress, Senate Report No. 1858.

³ Second session Sixty-ninth Congress, Record, p. 1259.

⁴ Record, p. 5895.

⁵ Second session Seventy-first Congress, Senate Report No. 47.

⁶ First session Seventy-first Congress, Record, p. 3413.

⁷ Charles Curtis, of Kansas as, Vice President.

⁸ Second session Seventy-first Congress, Record, p. 197.

Whereas in the consideration of said report, on the 9th day of December, 1927, the Senate, by solemn declaration declared "that the expenditure of such a large sum of money to secure the nomination of the said William S. Vare as a candidate for the United States Senate prima facie is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of a free government, and, together with the charges of corruption and fraud made in the report of said committee, and substantiated by the evidence taken by said committee, prima facie taints with fraud and corruption the credentials of the said William S. Vare for a seat in the United States Senate"; and thereupon the Senate referred the claim of the said William S. Vare to a seat in the United States Senate to the said committee, with instructions to grant such further hearing to the said William S. Vare and to take such further evidence on its own motion as it deemed proper in the premises; and

Whereas the said committee, having complied with the direction of the Senate, has made a further report to the Senate (Rept. No. 1858, 70th Cong., 2d sess.) of its doings in the premises. From said report and the evidence taken by the committee it appears that the evidence as to fraud and corruption in said primary election has not been refuted and the same stands as it did when the committee filed its partial report to the Senate (Rept. No. 1197, 69th Cong); and

Whereas the said committee, from the foregoing facts and conclusions, including those previously reported in regard to said primary election, has reported to the Senate (Rept. No. 1858, 70th Cong., 2d sess., p. 15) that the said William S. Vare is not entitled to a seat in the United States Senate; and

Whereas the Senate has delayed action upon said report on account of the illness of the said William S. Vare; and

Whereas the said William S. Vare has recovered from said illness and no further reason exists for longer delay on the part of the Senate: Therefore be it

Resolved, That the said report (S. Rept. No. 1858, 70th Cong., 2d sess.) be, and the same is hereby, approved and adopted; and be it further

Resolved, That the said William S. Vare be, and he is hereby, denied a seat in the United States Senate.

The Senate then ¹ agreed to the following resolution without debate or record vote:

Resolved, That William B. Wilson was not elected and is not entitled to a seat in the United States Senate from the State of Pennsylvania.

On November 12, 1929,² the Senate adopted resolutions authorizing the reimbursement of Mr. Wilson and Mr. Vare for expenses incurred in the contest.

181. The Texas election case of Wurzbach v. McCloskey, in the Seventy-first Congress.

The sitting Member having appeared before the committee and conceded the election of the contestant and withdrawn all pleadings, the committee expurgated its findings of fraud and confined its report to the brief statement that the contestant was entitled to be seated.

A resolution directing county officials to produce election records, in effect a subpoena duces tecum, was accorded high privilege.

On February 10, 1930,³ Mr. Willis G. Sears, of Nebraska, from the Committee on Elections No. 3, submitted the report of the committee in the Texas case of Harry M. Wurzbach v. Augustus McCloskey.

¹ Ibid.

² First session Seventy-first Congress, Record, p. 5476.

³ Second session, Seventy-first Congress, House Report No. 648.

In response to allegations of gross fraud the committee determined to examine election records and recount sundry ballots cast in the election, and on January 7, 1930,¹ Mr. Sears, by direction of the committee, requested immediate consideration for 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 add 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 circumstances attending the preparation of the report were explained by Mr. Sears in the course of the debate in the House:

As a matter of fact, the committee sat—and, I think, patiently—for about 10 days, and the committee unanimously was satisfied that Mr. Wurzbach had been elected and that his grave charges of fraud were true. Every member of the committee would have said that. At that stage of the proceedings, the contestee, Mr. McCloskey, appeared and said, in effect, “I am satisfied that I was not elected and that Mr. Wurzbach was elected, and I am contending no further in this matter.”

The previous question being ordered, the resolution was unanimously agreed to and Mr. Wurzbach appeared and took the oath.

Mr. William H. Stafford, of Wisconsin, having reserved a point of order as to its privilege, the Speaker² said:

The resolution not only provides for the presence of witnesses, but also provides for bringing before them the ballot boxes, and so forth. The Chair thinks it would be necessary to have such a resolution to bring that about.

The Chair can not recall an immediate precedent, but would think this is the proper way to cover the appearance of witnesses under the circumstances set forth.

The Chair would think that the committee might have adopted other methods, but thinks that this is clearly in order.

Extended hearings were held and preparations were made to indite a report, when the sitting Member appeared before the committee and conceded the nomination of the contestant and announced his withdrawal from the contest.

The committee accordingly submitted a brief report reading in full:

¹ Record, p. 1236.

² Nicholas Longworth, of Ohio, Speaker.

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.

WILLIS G. SEARS, *Chairman*.
CHARLES L. GIFFORD,
CHAS. BRAND,
ALBERT R. HALL,
ED. H. CAMPBELL,
JOHN W. MCCORMICK,
JOHN H. KERR,
BUTLER B. HARE.

182. The Maryland election case of Hill v. Palmisano, in the Seventy-first Congress.

A point of order being raised challenging the validity of a report on a contested-election case presented for filing, the Speaker directed that the report be printed with a reservation of the point of order.

Consideration of the point of order that the report on a contested-election case was not submitted within the time specified by the rules of the House.

On June 14, 1930,¹ Mr. Randolph Perkins, of New Jersey, submitted the report of the majority of the Committee on Elections No. 2 in the Maryland case of John Philip Hill v. Vincent L. Palmisano. According to the report, the contestant was credited by the official returns with having 27,047 votes and the contestee 27,377 votes, a majority of 330 votes for the latter.

The contestee having been seated, the contestant filed his notice of contest challenging the election returns, denying the validity of the election certificate, and assigning numerous grounds for the contest.

The proceedings of the committee are epitomized in the minority report as follows:

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.

¹Second session Seventy-first Congress, House Report No. 1901.

The majority find that the issues presented by the case may be reduced to two questions, the conduct of the election in the fourth precinct of the fourth ward and the personal knowledge and conduct of the contestee.

In considering the first of these questions the majority report:

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 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 majority therefore conclude:

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.

As to the second question the majority report:

There were registered from Palmisano's house 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.

On this finding of fact the majority decide:

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 not 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 minority views dissent from the majority findings of fact, insisting that charges of fraud in the precinct in question have not been substantiated and that the vote of alleged relatives of the contestee illegally cast from his residence was by impersonation, and recommending the adoption of resolutions declaring that the contestant has not been elected and that the sitting member is entitled to his seat.

On presentation¹ of the majority report for filing, Mr. Malcolm Tarver, of Georgia, raised a point of order and said:

¹ Second session Seventy-first Congress, Record, p. 11199.

The report has not been authorized. 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 Speaker¹ 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.

183. The Missouri election case of Lawrence v. Milligan, in the Seventy-first Congress.

The accuracy of the count in a disputed precinct being challenged, the House ordered a recount.

On June 6, 1930,² Mr. Randolph Perkins, of New Jersey, from the Committee on Elections No. 2, presented the report of that committee on the contested-election case of H. F. Lawrence v. Jacob L. Milligan, of Missouri.

According to the returns originally certified the contestant had received 32,626 votes and the contestee 32,665, a majority of 39 votes for the sitting Member. On this return the certificate of election was issued to the contestee who was seated by the House.

In the hearing of the case it developed that the issue turned on the accuracy of the count of the vote cast in the northeast precinct of Liberty. Accordingly an

¹ Nicholas Longworth, of Ohio. Speaker.

² Second session Seventy-first Congress, Record, p. 1814.

order was secured from the House and the ballots in question were brought to Washington and counted by the committee who report the following finding:

After the regular hearing of this case 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 recount of this precinct gave the contestee a clear majority of 46 votes, and the report of the committee confirming his title to his seat was agreed to in the House on June 13,¹ without debate or record vote.

184. The Florida election case of Lawson v. Owen, in the Seventy-first Congress.

A woman who had forfeited her citizenship through marriage to a foreign subject and who later resumed it through naturalization less than seven years prior to her election was held to fulfill the constitutional requirements as to citizenship to a seat in the House.

On March 24, 1930,² Mr. Carroll L. Beedy, of Maine, presented the report of the Committee on Elections No. I on the Florida case of William C. Lawson v. Ruth Bryan Owen.

The official return gave the sitting Member a majority of 30,842 votes. There was no question of fraud and the only issue involved in the case was whether Mrs. Owen on the date of her election had been seven years a citizen of the United States within the meaning of paragraph 2 of section 2, Article I of the Constitution.

Mrs. Owen was born in the United States and remained a citizen until her marriage to Reginald Altham Owen, a British subject, on May 3, 1910. Following her marriage she resided in England until May 30, 1919, when she and her husband returned permanently to the United States, where she made application for naturalization and was restored to citizenship on April 27, 1925. She was a candidate for Representative in Congress from the fourth congressional district of the State of Florida at the election held on November 6, 1928, and the petition in contest filed by the contestant cites numerous cases holding that votes cast for persons not in a position to serve have been construed as null and void.

In passing on this question the committee find:

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, is limited to cases involving ineligibility based on a palpable physical fact or on an established legal fact.

¹ Second session Seventy-first Congress, Record, p. 11099.

² Second session Seventy-first Congress, House Report No. 968.

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.

The committee then differentiate:

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.

The committee therefore conclude:

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.

As to whether the contestee had been seven years a citizen prior to the election, the committee agree unanimously that the sitting Member is eligible to election but differ as to methods of reaching that conclusion.

Five members of the committee, without regard to political considerations—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 remaining four members of the committee 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 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.”

The committee therefore unanimously conclude that the sitting Member meets the constitutional requirements of eligibility as to citizenship, and recommend the adoption of the usual resolutions denying the election of the contestant and affirming the election of the contestee.

After brief debate the resolutions were agreed to in the House on June 6¹ without division.

185. The Indiana election case of Updike v. Ludlow, in the Seventy-first Congress.

Instance wherein the time permitted by the rules in which the election committees of the House shall make final report on contested-election cases was extended by resolution.

On June 25, 1930,² on motion of Mr. Carroll L. Beedy, of Maine, from the Committee on Elections No. 1, the House agreed to the following resolution:

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.

¹ Second session Seventy-first Congress, Record, p. 10620.

² Second session Seventy-first Congress, Record, p. 11701.