

Chapter CLXIV.¹

TESTIMONY IN CONTESTED ELECTIONS.

1. Rules of Elections Committee. Section 110.
 2. Extension of time for taking. Sections 111-116.
 3. Evidence taken *ex parte*. Section 117.
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110. Rules of the elections committees for hearing a contested election case.—Committees on Elections in the House of Representatives have adopted rules to govern the hearing of a contested case. The rules, as amended in 1923, are as follows:

1. All proceedings of the committee shall be recorded in the journal, which shall be signed by the clerk.
2. No paper shall be removed from the committee room without the permission of the committee, except for the purpose of being printed or used in the House.
3. Each contestant shall file with his brief an abstract of the record and testimony in the case. Said abstract shall, in every instance, cite the page of the printed testimony on which each piece of evidence referred to in his abstract is contained. If the contestee questions the correctness of the contestant's abstract, he may file with his brief a statement setting forth the particulars in which he takes issue with the contestant's abstract; and may file an amended abstract setting forth the correct record and testimony.
4. The time allowed for argument before the committee, unless otherwise ordered, shall be divided as follows: The contestant or his counsel shall be limited to one hour in opening; the contestee or his counsel shall follow for a period not exceeding one hour and a half; and the contestant or his counsel shall be entitled to half an hour in closing.
5. No persons shall be present during any executive session of the committee except members of the committee and the clerk.
6. All papers referred to the committee shall be entered on the House docket by the House docket clerk according to the number of the packages, and they shall be identified upon the docket.
7. Nothing contained in these rules shall prevent the committee, when Congress is in session, from ordering briefs to be filed and a case to be heard at any time the committee may determine.
8. The words "and without unnecessary delay" in the third line of section 127 of the Revised Statutes, as amended by the act of March 2, 1887, shall be construed to mean that all officers; taking testimony to be used in a contested-election case shall forward the same to the clerk of the House of Representatives within 30 days of the completion of the taking of said testimony.
9. The foregoing rules shall not be altered or amended except by a vote of a majority of all the members of the committee.

111. The Pennsylvania election case of Hawkins v. McCreary in the Sixty-second Congress.

¹Supplementary to Chapter XXIII.

Although the contestant delayed the filing of testimony and briefs beyond the statutory time, the House, in view of the seriousness of the charges, consented to hear the case.

Irregularities insufficient to change the result of the election do not justify a contest.

Where it appeared that even if contestant's contentions were conceded the contestee would still have a majority of the votes cast, the House confirmed the title of sitting Member.

Although it appeared that fraud and illegal practices were prevalent in the general election, yet in the absence of legal proof that the fraud and illegal methods complained of entered into the particular election under consideration the House declined to vacate the seat.

On February 15, 1913,¹ Mr. Henry M. Goldfogle, of New York, from the Committee on Elections No. 3, submitted the report in the Pennsylvania case of Frank H. Hawkins *v.* George D. McCreary.

The filing of testimony in this case was delayed beyond the time provided by law, and the report explains:

The contestant delayed the filing of the testimony in the case until some time during the second session of the Sixty-second Congress. The contestant's brief was not filed or submitted until after the third session began. According to the request of the counsel for the contestant, a hearing of the case was not held until the third session. In view of the serious charges of fraud and corruption and of illegal registration and illegal voting at the congressional election in said congressional district in 1910, your committee, notwithstanding the delay referred to, concluded to hear the case.

Upon hearing the evidence in the case the committee found:

Allowing the contestant the votes which he claims should have been counted for him and deducting them from the number credited on the returns to the contestee, and entirely eliminating from the returns the votes in the districts wherein it was shown irregularities either in registration or voting occurred, it would still appear that the contestee, Mr. McCreary, had a majority of the remaining votes.

As to charges of fraud:

While it was charged and from the evidence it appeared that at the time of the election in 1910 and for years prior to that time, gross evasion of law, illegal registration, fraudulent voting, and corrupt conduct had occurred in Philadelphia, yet legal proof was lacking to establish the fact that the fraud and corruption and illegal methods complained of entered into the election in the congressional district under consideration such as would justify a finding that the election of the member from the sixth congressional district of Pennsylvania was violated, and that in consequence his seat in this House ought to be declared vacant.

The committee therefore recommended the following resolutions:

Resolved, That Frank H. Hawkins, the contestant, was not elected a Member of the House of Representatives in the Sixty-second Congress, and is not entitled to a seat therein.

Resolved, That the Hon. George D. McCreary was duly elected a Member of the House of Representatives in the Sixty-second Congress, and is entitled to a seat therein.

The resolutions were agreed to by the House without debate or record vote.

¹Third session Sixty-second Congress, House Report No. 1525; Journal, p. 262; Record, p. 3214; Moores' Digest, p. 61

112. The Illinois election case of Davis v. Williams in the Sixty-fourth Congress.

Specification of particulars wherein a petition for extension of time for taking testimony was deficient.

Instance wherein the application of contestant for additional time in which to take testimony was refused.

A recount of a part of the ballots will not be ordered at the instance of one party when impossible to grant a recount of the remaining ballots if requested by the other party.

A contestant having failed to show reasonable diligence, the request for time to take further testimony was denied.

The contestant having died, the committee did not recommend to the House a resolution declaring he had not been elected.

On July 21, 1916,¹ Mr. Hubert A Stephens, of Mississippi, from the Committee on Elections No. 1, submitted the report in the Illinois case of J. McCan Davis v. Wm. Elza Williams.

The official return in this case gave the contestee 375,465 votes and the contestant 373,682, a majority of 1,783 votes in favor of the sitting Member.

The notice of contest alleged general irregularities and informalities.

The election commissioners when subpoenaed as witnesses refused to produce the ballots for inspection, and on application of the contestant the district court entered an order directing the production of the ballots.

On March 10, 1916, the contestant filed with the committee a prayer for a recount and recanvass, as follows:

Wherefore contestant prays that the House of Representatives authorize and direct a complete recount of ballots and a complete recanvass of precinct returns in the city of Chicago of the election November 3, 1914, for the office of Representative in Congress at large, said recount and recanvass to be conducted as expeditiously as possible under the direction of Elections Committee No. 1.

The contestant urged favorable consideration of his application on the ground that it was impossible to recount the ballots in the city of Chicago in the 40 days allowed by law.

The committee, however considered the application deficient in form:

Contestant does not accompany his petition with affidavits showing what he expects to prove if this extension was granted, or the name of any person that he expects to call as a witness. His petition is not sworn to. Neither is there anything in the original record to show that he has proven anything on which to base his contest.

In fact, the record brings nothing before the committee except notice of contest and answer thereto. The record contains many pages of what purports to be testimony in the case. It is stated that certain witnesses testified and what purports to be their testimony is set out, but no witness attested his statement, although attestation by the witnesses is required by statute. The witnesses were examined, as the record shows, before two notaries public, but the record is only certified by one notary.

¹First session Sixty-fourth Congress, House Report No. 1003; Journal, p. 890; Record, p. 11401; Moores' Digest, p. 89.

Therefore there is nothing legally before the committee to show anything in regard to the matter in controversy.

The notice of contest and what was attempted to be proven show that the contestant had no actual knowledge of any evidence that will prove his right to the seat in the House, nor had he knowledge of any witness or witnesses by whom he could make such proof. No effort was made to prove fraud in the election, the basis of the contest being the hope that a recount of 400,000 ballots cast in the city of Chicago would show that errors were made in the original count and tabulation of the votes, and that a correction of these errors would seat him.

An additional objection is also pointed out:

Under a provision of the Illinois statute all ballots cast in an election shall be preserved for six months. After that time they are to be destroyed unless an order is obtained to have them preserved for use in a contest. The parties to this contest were candidates at an election held November 3, 1914, and on May 3, 1915, the contestant applied to the court for an order requiring the preservation of the ballots in the city of Chicago. This was a proceeding against the election commissioners. On May 11, 1915, the following order was entered by the court:

“On motion of attorney for plaintiff it is ordered that the ballots now in the custody of the election commissioners of the city of Chicago, cast at the election on November 3, A. D. 1913, be impounded, to be used as evidence in a contest now pending between J. McCan Davis and Wm. Elza Williams for the office of Representative at large for the State of Illinois.

“It is further ordered that the election commissioners for the city of Chicago be the custodians of the same, and they are ordered to keep the same in a safe place and guard the same, in order to preserve the inviolability of the same until the further order of this court.”

It will be observed that the order of the court shows that only the ballots of the city of Chicago were to be preserved. It was stated to the committee at a hearing that there were about 1,100,000 votes cast in Illinois, of which number about 400,000 votes were cast in Chicago, and that all ballots except those in Chicago were destroyed. Therefore, there are about 700,000 ballots that cannot be recounted. The committee does not think that it would be justified in recommending a recount of part of the ballots at the instance of one party, when it would be absolutely impossible for a recount of the remainder of the ballots to be had by the other party. Especially is this true in this case where there is no charge or proof of fraud, and the committee is asked simply to set out on a “fishing expedition,” the only reason for which being the mere hope that errors in the count may be found.

As has been stated, the statements that purport to be the testimony of certain witnesses are unattested and the record is not certified properly; but brief reference will be made to the recount of ballots. The ballots in 61 precincts were recounted. Contestant gained in 25 precincts and contestee gained in 21. In several precincts the count was found to be correct. In several precincts each would gain and in others each would lose. Generally the gain or loss was very small. It does not appear that any fraud was committed, but that any mistakes were the result of error in the count. In this state of case it would be unfair to have one-third of the ballots recounted and let that count determine the result of this contest.

As a further reason:

Contestant used only 8 of the 40 days allowed by law in taking testimony and recounting ballots he did not file the record with the Clerk of the House until eight months after time for taking testimony had closed; and his petition for a recount of ballots was not filed for more than three months after Congress had convened.

Such a lack of diligence was shown on the part of contestant that the committee did not feel that an extension of time for the purpose of taking proof should be granted.

As the contestant died immediately following the consideration of the case by the committee, and before the report was submitted to the House, it was not considered necessary to submit a resolution declaring the contestant had not been elected, and the following resolution only was recommended for adoption:

Resolved, That Wm. Elza Williams was elected a Member of the Sixty-fourth Congress from the State of Illinois at large, and is entitled to a seat therein.

113. The Alaska election case of Wickersham v. Sulzer and Grigsby in the Sixty-sixth Congress.

Upon the death of the Member-elect the House provided by resolution for method of taking of testimony and service of notices.

Instance wherein the House by resolution extended time for taking testimony in a contested-election case.

Ex parte evidence is not admissible in a contested-election case even where death of Member-elect prevents service of notice that testimony is to be taken.

A Territorial legislature is without power to change provisions embodied by Congress in the legislative act creating the Territory.

The vote of a qualified elector prevented from voting through error or misconduct of election officials will be counted upon presentation of proof.

Votes cast before the hour provided by law for opening of polling places should not be counted.

Discussion as to distinction between laws mandatory and directory.

On February 12, 1921,¹ Mr. Cassius C. Dowell, of Iowa, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the Alaska case of Wickersham v. Sulzer and Grigsby.

The report says:

From the official count as reported by the canvassing board, Francis Connolly received 329 votes, Charles A. Sulzer 4,487 votes, James Wickersham 4,454 votes. Sulzer's plurality 33.

Before the canvassing board had completed the canvass and announced the result, and on April 15, 1919, Charles A. Sulzer died. The canvassing board completed the canvass and declared the result on April 17, 1919, and issued a certificate of election certifying the election of Charles A. Sulzer, which certificate was duly filed with the Clerk of the House of Representatives.

The Legislature of Alaska passed an act providing for a special election to fill the vacancy caused by the death of Mr. Sulzer. This act was approved on April 28, 1919. Under this act the governor called a special election, which was held on June 3, 1919, at which special election James Wickersham was not a candidate, and George B. Grigsby received a majority of the votes cast, and the canvassing board on June 14, 1919, issued a certificate of election to George B. Grigsby, the contestee herein, which certificate was filed on July 1, 1919, and he was sworn in and took his seat in the House of Representatives as such Delegate from Alaska on said date.

After the death of Charles A. Sulzer, and after the certificate of election had been issued to him, James Wickersham, the contestant, on May 3, 1919, filed notice of contest with the Clerk of the House, and under this notice took some ex parte testimony in the case. Contestant also about June 23, 1919, served notice of contest on Mr. Grigsby, notifying him of his intention to contest the special election of June 3 and also the election of Sulzer on November 5, 1918.

The contestant being unable on account of the death of the Member-elect to comply with the statute in giving of notice and taking of testimony, proceeded to take ex parte testimony.

¹Third session Sixty-sixth Congress; House Report No. 1319; Record, p. 3074.

The committee, however, held:

The Committee on Elections, finding the testimony taken by contestant was ex parte, it therefore could not consider such evidence in the case.

To meet this emergency the House on July 28, 1919,¹ agreed to the following resolution:

Resolved, (1) That the time for taking testimony in the contested-election case from Alaska, James Wickersham, contestant, wherein the contestee, Charles A. Sulzer, died on April 15, 1919, two days before the issuance of the certificate of election to said Sulzer, be, and the same is hereby, extended for 90 days from the date of the passage of this resolution; (2) that contestant, Wickersham, shall have the first 40 days thereof in which to take his testimony, which shall be taken in the manner provided by the present statutes governing the taking of testimony in contested-election cases by notice served on George B. Grigsby, the successful candidate in the special Alaska election of June 3, 1919; (3) said George B. Grigsby shall have the next 40 days in which to take testimony in opposition to contestant's claim to the election of November 5, 1918, and in support of his own right shall be seated by virtue of said special election; (4) the contestant, Wickersham, to have the final 10 days in which to introduce rebuttal testimony in both elections; (5) that the governor of Alaska and the custodian of the election returns and attached ballots of the election of November 5, 1918, be, and he is hereby, commanded and required forthwith to forward by registered mail to the Clerk of the House of Representatives the whole of the election returns and all attached papers and ballots of the election of November 5, 1918, for inspection and consideration as evidence by the House of Representatives in said contested-election case; (6) and if either the contestant or the successful candidate, said George B. Grigsby, at said special election of June 3, 1919, desires the returns of that election introduced in evidence, it shall be done under the same authority and in the same manner as is provided by this resolution for securing the returns of the election of November 5, 1918; (7) that any notice which contestant would be required to serve on said Sulzer if living, to take testimony of any witness mentioned herein, or to be called to sustain any allegation in contestant's case or any other notice which contestant might be required to serve on contestee, if living, shall be served with the same legal effect on the successful candidate, said George B. Grigsby, at the said special election; (8) and any notice which the successful candidate at said special election might find necessary to serve to present his case under either of said elections may be served on contestant; (9) that the Secretary of War be, and he is hereby, requested to order by telegraph immediately on the passage of this resolution that the 40 soldiers named and whose Army status is described in the certified list, dated June 11, 1919, signed by the War Department officials, and which list is attached to the application of contestant for the passage of this resolution, be assembled at the office of the commanding officer of the United States military cable and telegraph in the towns of Valdez, Sitka, and Fairbanks, Alaska, within the 40 days' period for taking testimony by the contestant, then to be examined under oath by contestant or his attorney or agent touching the matters and things alleged in the notice and statement of contest on file in this House and in this cause, each to state specifically which candidate he voted for, and (10) the testimony of all witnesses shall be reduced to writing, signed by the witness, verified, and returned to the Clerk of the House of Representatives for use in these causes in the manner provided in the laws of the United States relating to contested elections as modified by this resolution.

Under this resolution George B. Grigsby was substituted for Charles A. Sulzer in all necessary respects in the service of notice and taking of testimony.

Pursuant to this resolution the parties took testimony which was submitted to the committee, which then analyzed the issues presented by the case as follows:

The questions in this case are, first, the election on November 5, 1918, as between James Wickersham, contestant, and Charles A. Sulzer; second, the election of George B. Grigsby at the

¹First session Sixty-Sixth Congress, Journal, P. 338, Record, p. 3252.

special election of June 3, 1919. The special election was to fill the vacancy caused by the death of Charles A. Sulzer, and in the event Sulzer was duly elected on the 5th of November, 1918, the question then turns to the objections contestant makes to the special election on June 3, 1919. In the event James Wickersham was elected on November 5, 1918, and not Charles A. Sulzer, there was no vacancy created by the death of Charles A. Sulzer and therefore no vacancy could be filled at the special election on June 3, 1919.

The first question considered by the report relates to the qualifications of electors and is thus discussed:

In 1906, on May 7, Congress passed an act *governing elections in Alaska*. Section 3 of this act, being section 394, Compiled Laws of Alaska 1913, reads as follows:

“SEC. 394. All male (or female) citizens of the United States 21 years of age and over who are actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election, and who have been such residents continuously for thirty days next preceding the election in the precinct in which they vote, shall be qualified to vote for the election of a Delegate from Alaska.”

Under this act it is clear that no one can lawfully vote in Alaska for Delegate who is not (1) a citizen of the United States and 21 years of age; (2) an actual and bona fide resident of Alaska, and has been such resident continuously during the entire year immediately preceding the election and continuously for 30 days next preceding the election in the precinct in which they vote.

On August 24, 1912, Congress passed an act creating a legislative assembly in Alaska, and in this act changed the time of election for Delegate to Congress from August to November, and provided that “all of the provisions of the aforesaid act shall continue to be in full force and effect, and shall apply to the said election in every respect, as is now provided for the election to be held in the month of August therein.”

Mr. Grigsby, as attorney general of Alaska, rendered an opinion to the Territorial governor, a member of the canvassing board, on February 12, 1919, in the following language:

“I have to advise you that the legislature in attempting to change the qualifications of voters by this act exceeded its power, the qualifications having been fixed by the act of May 7, 1906, and continued in full force and effect by the organic act or constitution of Alaska. The organic act expressly authorized the legislature to extend the elective franchise to women, but in no other way authorized the changing of the qualifications of electors by the legislature.

“Respectfully submitted.

“GEORGE B. GRIGSBY, *Attorney General.*”

This, we think, is the correct interpretation of this law. The Territorial Legislature of Alaska attempted to modify this law by the enactment of a provision permitting electors to vote in any precinct in the judicial division of the Territory, thus ignoring the provisions of the congressional act which requires the actual and bonafide residence in Alaska for one year and such residence continuously for 30 days next preceding the election in the precinct in which they vote. In this respect the Territorial law is in direct conflict with the Federal statute. The Federal statute is incorporated into the organic law of the Territory and, as stated by Mr. Grigsby as attorney general, can not be set aside by an act of the Legislature of Alaska.

As it appeared from the evidence that 21 nonresidents had voted for Charles A. Sulzer and 11 for James Wickersham the majority deducted these votes from the total number case for them respectively.

The minority views, submitted by Messrs. C. B. Hudspeth, of Texas, and James O'Connor, of Louisiana, dissent from this decision but without discussing the merits of the question.

The majority also count the vote of an elector alleging denial by election officials of his request to be allowed to vote:

At the Chickaloon precinct in the third division one John Probst, a legal voter in the precinct presented himself at the poles and offered to vote, but was informed that the election officers

had taken the ballot box and books up the creek and he could not vote. If permitted to vote he would have voted for James Wickersham. The committee finds that this vote should be added to the aggregate vote for James Wickersham.

This decision is criticized by the minority:

The majority of the committee counts the vote of one John Probst at the Chickaloon precinct for said Wickersham upon the ground that he was denied a right to vote at said box. The evidence shows that said Probst appeared at said voting place about 2 o'clock in the day and was informed that the poll list was somewhere up the creek. He went back to his place of business and at 4 o'clock on that day was notified by one Manning that he could go and vote; that the polls were open. This he declined to do. He had every opportunity to cast his ballot, but did not do so. The minority of your committee feel that the pretended effort on his part to vote was a mere subterfuge; that he had ample opportunity to vote and he did not; and that vote should not be counted for said Wickersham.

In Catch Creek precinct it was charged that ballots were cast before the time fixed by statute for opening the polling places.

A section of the organic act establishing the Territorial government provides:

SEC. 9. That the election boards herein provided for shall keep the several polling places open for the reception of votes from 8 o'clock antemeridian until 7 o'clock postmeridian on the day of election.

According to the majority report the testimony indicated that all votes at this precinct were cast about 5 o'clock in the morning.

The minority concede that the voting probably took place before 8 o'clock, the time fixed by the statute for opening the polling places, but take the position that as no one was deprived of the right to vote and there was no taint of fraud, the vote should be counted as cast. The majority find a parallel in the Kentucky case of *Verney v. Justice* and quotes from the opinion in that case:

The section under consideration uses the word "shall"; it is mandatory and excludes the right to hold the election earlier than 6 o'clock in the morning and later than 7 o'clock in the evening. If the language was construed as directory merely, the election might not only be continued until 9 or 10 o'clock at night but all next day and the day after, and on and on, unless the courts in the exercise of a discretion should limit it and thus make a constitutional provision in disregard of the one made by the people for the government of election.

For these reasons it is clear that the votes cast after 7 o'clock in the evening for the appellant were illegal, and that the circuit court did right in excluding them.

Under this precedent the entire vote of the precinct is rejected.

114. The election case of Wickersham v. Sulzer and Grigsby, continued.

Votes cast at precincts established in violation of election laws are illegal and should be rejected.

Reaffirmation of former decision of the House relating to votes cast by native Indians.

Discussion as to domicile and validity of votes cast by soldiers.

Where impossible to show for whom illegal votes were cast they will be deducted from the vote of both candidates in proportion to the total votes received by each.

As to Forty Mile district:

The contestant charges that in the Forty Mile district there was an official suppression of the election in certain precincts in the district in the interest of Mr. Sulzer, whereby the contestant

lost some 20 votes. The testimony discloses that prior to the election in 1918 there were five voting precincts in this district, known as the Jack Wade precinct, Steel Creek precinct, Franklin precinct, Chicken precinct, and Moose Creek precinct. That about October 1, 1918, Commissioner Donovan, of the district, made an order redistricting the district into three voting precincts, to wit, Franklin, Chicken, and Moose Creek, thereby abolishing the Jack Wade and Steel Creek voting precincts in the district, or rather merging these precincts into the other three precincts, and it is charged that this was done for the purpose and that it had the effect of placing the voting precincts at such great distances from the voters that the voters in the Jack Wade and Steel Creek precincts, by reason of the great distance, were unable to reach the polls and to cast their ballots at the election.

The authority of the commissioner in providing voting precincts in the various election districts as defined in the act of May 7, 1906, is as follows:

SEC. 5. That all of the territory in each recording district now existing or hereafter created situate outside of an incorporated town shall, for the purpose of this act, constitute one election district; that in each year in which a Delegate is to be elected the commissioner in each of said election districts shall, at least thirty days before the date of said first election and at least sixty days before the date of each subsequent election, issue an order and notice, signed by him and entered in his records in a book to be kept by him for that purpose, in which said order and notice he shall—

First. Divide his election district into such number of voting precincts as may in his judgment be necessary or convenient, defining the boundaries of each precinct by natural objects and permanent monuments or landmarks, as far as practicable, and in such manner that the boundaries of each can be readily determined and become generally known from such description, specifying a polling place in each of said precincts, and give to each voting precinct an appropriate name by which the same shall thereafter be designated: *Provided, however,* That no such voting precinct shall be established with less than thirty qualified voters resident therein; that the precincts established as aforesaid shall remain as permanent precincts for all subsequent elections, unless discontinued or changed by order of the commissioner of that district.

Second. Give notice of said election, specifying in said notice, among other things, the date of such election, the boundary of the voting precincts as established, the location of the polling place in the precinct, and the hours between which said polling places will be open. Said order and notice shall be given publicity by said commissioner by posting copies of the same at least twenty days before the date of said first election, and at least thirty days before the date of each subsequent election, etc.

The majority report quotes the order of the commissioner establishing three precincts in lieu of the original five, and holds:

This order, fixing the precincts in this district, is not in compliance with the law above set forth. It was not issued and entered in his records 60 days before the date of the election and does not specify a polling place in each precinct as required by law, and does not give the location of the polling places in each precinct as provided by law. The abolishing of the Jack Wade and Steel Creek precincts, the largest centers in this division, both of them having post offices where the residents for miles around went for their mail, and including the territory of these precincts in other precincts, and the placing of the voting precincts at Franklin, Chicken, and Moose Creek, the latter place having only two residents, the committee believes was for the purpose of depriving the voters of Jack Wade and Steel Creek precincts from having an opportunity to cast their votes. This action of the commissioner, as shown by the record, was in violation of law and did deprive 20 legal voters from casting their votes at the election.

However, the committee finds that the whole action of the commissioner in the Forty Mile district in redistricting said district on the 1st day of October, 1918, was in violation of the law and this action of the commissioner did deprive at least 20 legal voters from casting their ballots at said election, and said action was without authority or jurisdiction.

It is the judgment of the committee that the votes cast in said entire district, which includes the precincts of Chicken, Franklin, and Moose Creek, were illegal and should be rejected.

The contention over the vote cast by Indians at various precincts is briefly disposed of by the majority:

It is contended by both parties that in certain precincts the votes of a number of Indians should not have been counted. The contestant claims, and with much force, that in a number of precincts where Indians voted and the majorities were for the contestee, the Indians were not entitled to vote, because they had not severed their tribal relations and were not citizens in the sense that they were qualified electors. The contestee claims that at certain other precincts, where the majorities were for the contestant, a portion of the vote being that of Indians was not legal for like reasons.

This identical question arose in the former case in the Sixty-fifth Congress, and the House, following the report of the committee, disposed of this question and did not exclude the Indian vote. Your committee believes it should follow the ruling of the House in the former case, and not disturb this vote.

The question of the soldier vote is also decided according to recent precedent. After quoting from the report of the committee in the case of *Wickersham v. Sulzer* in the Sixty-fifth Congress the majority continue:

The question of the soldier vote in Alaska was determined by the committee and afterwards by the House in the Sixty-fifth Congress in the case of *Wickersham v. Sulzer*. This case having been so carefully investigated and so well considered, having the unanimous endorsement of the former committee and a large majority of the House, this committee has considered the question settled, and in view of the fact that this case was determined so recently, we have used that decision as the law in this case, and have followed it.

Of the soldier vote in the 1918 election, *Wickersham* received 5 votes, *Sulzer* received 24 votes, and 16 of them refused to testify for whom they voted, or evidence was not presented to show for whom they voted. Of the votes of the ones where the testimony shows for whom they voted, there should be deducted from the total vote of *Wickersham* 5 votes, and from the total vote of *Sulzer* 24 votes, a net loss to *Sulzer* of 19 votes.

As it was not possible to show for whom these 16 votes were cast they were deducted proportionately from the vote of both candidates under the rule laid down in the case of *Wickersham v. Sulzer*, as follows:

In purging the polls of illegal votes the general rule is that unless it be shown for which candidate they were cast they are to be deducted from the whole vote of the election division and not from the candidate having the largest number. Of course, in the application of this rule such illegal votes should be deducted proportionately from both candidates, according to the entire vote for each.

Readjusting the entire vote in accordance with these findings, the result reached by the majority is:

<i>Wickersham</i>	4,422
<i>Sulzer</i>	4,385
	37
Wickersham's plurality	37

The following resolutions are therefore recommended:

Resolved, That Charles A. *Sulzer* was not elected a Delegate to the House of Representatives from the Territory of Alaska in this Congress, and George B. Grigsby, who is now occupying the seat made vacant by the death of said *Sulzer*, is not entitled to a seat herein.

Resolved, That James *Wickersham* was duly elected a Delegate from the Territory of Alaska in this Congress, and is entitled to a seat herein.

The minority dissenting from each conclusion reached by the majority, offer the following resolutions in lieu of those recommended by the majority.

Resolved, That James Wickersham was not elected a Delegate to the Sixty-sixth Congress from the Territory of Alaska, and is not entitled to a seat in said Congress.

Resolved, That Charles A. Sulzer was duly elected a Delegate from the Territory of Alaska to the Sixty-sixth Congress, and that said Charles A. Sulzer having died, and George B. Grigsby having been elected at a special election as a Delegate from the Territory of Alaska, and having been sworn in as a Member of the House of Representatives on July 1, 1920, that the said Grigsby is entitled to retain his seat therein.

The case was debated at length in the House on February 28, and March 1.¹ On the latter day Mr. Finis J. Garrett, of Tennessee, moved to recommit the report and resolutions. The motion was rejected—yeas 169, nays, 188. The substitute resolutions proposed by the minority were then separately disagreed to—yeas 169, nays 179, and yeas 163, nays 179, respectively. The question recurring upon the original resolutions they were separately agreed to, the first declaring the contestee not elected—yeas 183, nays 162; and the second declaring contestant elected and entitled to the seat—yeas 177, nays 163.

Mr. Wickersham then came forward and took the oath of office.

115. The Illinois election case of Gartenstein v. Sabath in the Sixty-seventh Congress.

While the statute limiting the time for taking testimony in a contested-election case has been held to be directory and is not binding on the House, if further time is required it must be granted by the House and will be granted only upon the showing of good and sufficient reason therefor.

Parties to a contested-election case may not by stipulation nullify rules of pleading or usurp prerogatives of the committee or the House.

Before a recount of ballots may be had, proof must be made of the inviolability of the ballot boxes and their contents.

Before resort can be had to ballots as evidence, absolute proof must be made that they are the identical ballots cast at the election; that they have been kept as required by law; that there has been no opportunity to tamper with them; and that they are in the same condition as when cast. The burden of such preliminary proof rests upon the party offering the ballots as evidence.

The ballots themselves constitute the best evidence and the count of election officials should not be set aside by testimony of a witness who merely looked at the ballots and testified to the results.

The House will not set aside the official returns except upon positive proof that the official count was incorrect.

A recount should include all ballots cast at the election and the House declines to order recount if any portion of the ballots have not been preserved.

Official papers and lists of voters are the best and only evidence of their contents, and statements of witnesses assuming to detail contents of such papers are not admissible.

¹Third session Sixty-sixth Congress; Journal, p. 276, Record, p. 4189.

On December 20, 1922,¹ Mr. Cassius C. Dowell, of Iowa, from the Committee on Elections No. 3, submitted the report of the committee in the Illinois case of Jacob Gartenstein *v.* Adolph J. Sabath.

The sitting Member had been returned by an official majority of 298 votes. The contestant attacked this majority, charging frauds, irregularities, errors, and mistakes, and alleging that a true and correct tabulation of the votes would show that contestant had been elected by a plurality of more than 1,500 votes.

A preliminary question presented for the consideration of the committee related to compliance with the statute limiting the time within which testimony in such cases may be taken.

This statute provides:

SEC. 107. In all contested-election cases the time allowed for taking testimony shall be 90 days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first 40 days, the returned Member during the second 40 days, and the contestant may take testimony in rebuttal only during the remaining 10 days of said period. This shall be construed as requiring all testimony in cases of contested elections to be taken within 90 days from the date on which the answer of the returned Member is served upon the contestant.

It appears from the evidence presented that the contestant did not begin the taking of testimony until 25 days after the time prescribed by the statute had expired.

The committee accordingly held:

While this statute has been held to be directory, and is not binding upon the House, yet under ordinary circumstances the contestant has been required to commence and complete his evidence within the 40 days allowed by statute, and if further time is required it must be granted by the House, and may be granted only after showing a good and sufficient reason therefor.

In the case under consideration the contestant not only does not show diligence but the record clearly shows without reason or excuse by numerous stipulations undertook to set aside the operation of the statute and practically took no testimony in the 40 days allowed him by statute. Had the contestant come before the House asking for an extension of time to take testimony after the expiration of the 40 days there can be no question this would not have been granted to him, for the record discloses that he had no good reason to ask for extension of time for taking testimony. However, at each date to which extension had been made he stipulated with the contestee for further continuances and extensions, and without asking leave of the House, undertook to set aside the statute limiting time for taking the evidence.

Your committee finds in this case that contestant was not diligent in prosecuting his case, and did not present his proofs within the time prescribed by statute.

As the decision in the case turns largely on the question of the correctness of the official count of the ballots, the committee discuss at length the admissibility of evidence in attacking official returns, and the conditions governing a recount.

At the outset the committee agree:

Before a recount of the ballots may be had in an election contest proof of inviolability of the ballot boxes and their contents is necessary.

After quoting testimony showing the manner in which the ballots had been preserved and produced for inspection in this case, the report continues:

The proofs in this case show that the judges of election, after counting and canvassing the ballots, placed them in boxes and delivered them to the election commissioners' office. The

¹ Fourth session Sixty-seventh Congress, House Report No. 1308.

delivery of these ballots began at 8 or 9 o'clock on the evening of the election and continued until the afternoon of the following day. The evidence discloses that the ballot boxes in some instances were not of sufficient size to hold all the ballots cast in the precinct, and when this happened the ballots were folded and tied with a rope and the bundle was delivered with the ballot box to the commissioners' office. The evidence shows these ballots remained in the office of the election commissioners for some time and that a number of employees were designated to handle the ballots and store them in the vault on the floor above. A number of these were temporary employees.

The law of the State of Illinois relative to the canvass of votes was as follows:

Immediately after making such proclamation and before separating, the judges shall fold in two folds and string closely upon a single piece of flexible wire all ballots which have been counted by them, except those marked "Objected to," unite the ends of such wire in a firm knot, seal the knot in such manner that it can not be untied without breaking the seal, inclose the ballots so strung in a secure canvas covering and securely tie and seal such canvas covering with official wax impression seals to be provided by the judges, in such manner that it can not be opened without breaking the seals, and return said ballots, with the package containing the ballots marked "Defective" or "Objected to" in such sealed canvas covering to the proper clerk or to the board of election commissioners, as the case may be, etc.

Under this law the committee, after considering the evidence, decide:

The record in this case not only does not show that the ballots were folded, wired, and sealed when presented to the commissioner taking testimony, as required by law, but the proofs affirmatively show that in a number of the precincts the ballot boxes were not tied and sealed as required by the Illinois statute. In some instances at least the evidence clearly shows that the ballot boxes were not at all sealed when taken from the vault, but were tied and bundled together in such manner that the boxes could be opened and closed without disturbing the appearance of the ballot boxes.

With the ballots and ballot boxes in this condition, and with the evidence of Mr. Curran that people were in and out of the vault where these ballots were kept, it seems to your committee that the proofs of the integrity of the ballots have not been established. Therefore your committee holds that proofs of the proper and legal preservation of the ballots have not been established in this case.

In reaching this conclusion the committee quote with approval the following:

It is well settled that before resort can be had to the ballots as means of proof, absolute proof must be made that the ballots offered are the identical ballots cast at the election; that they had not been safely kept as required by law; that they are in the same condition they were when cast; that they had not been tampered with, and that no opportunity had been had to tamper with them. The burden of making this preliminary proof rests upon the party who seeks to use the ballots as evidence. (*English v. Hilborn*, 53d Cong., Rowell, p. 486.)

In order to command confidence in a recount "it is necessary for the contestant first to establish the identity of the ballot boxes, and, secondly, show that these boxes had been so kept as to rebut any presumption that they had been tampered with." (*Butler v. Layman*, 37th Cong.) In this case the minority report was adopted by the House.

The law regards with jealousy and suspicion recounts of ballots and is slow to sanction any change from results originally declared to results effected by such recounts. The rules of law governing recounts of ballots are plain and positive. Before courts or legislative bodies will give weight to results of recounts of ballots, it must be shown absolutely that the ballot boxes containing such ballots had been safely kept; that the ballots were undoubtedly the identical ballots cast at the election; and when these facts are established beyond all reasonable doubt, then full force and effect are given to the developments of the recount. In this case the committee found the evidence sufficient and accepted the results of recounts. (*Acklen v. Darrall*, 45th Cong.)

The temptation to tamper with and change the ballots after an election is so great, especially when the election is close and a slight change will elect the one and defeat the other candidate,

that courts and the House have uniformly required the party offering the ballots to overcome the official count made at the time of the election to show that the ballots have been kept strictly as required by law. Upon the person offering the ballots is cast the burden of showing that the ballots offered for recount are the identical ones cast at the election and have been in no way tampered with or changed. (*Wallace v. McKinley*, 48th Cong.)

The returns of election officers are prima facie correct, and a recount showing a differing result can not be regarded unless it affirmatively appears that the ballots recounted are the as those originally counted and in the same condition.

The contestant produced evidence attacking the returns but did not follow the above rulings in developing his case, and the committee hold:

Contestant, in order to establish his claim of error and miscount, called certain witnesses, who were clerks in the election commissioner's office. These witnesses were called upon by contestant to go through the ballots in a number of the precincts in the fifth congressional district and announce to another witness, who kept tally of the votes announced for Member of Congress in the precinct, which witness afterwards read the results of the tally to the commissioner taking depositions. In this manner the contestant went through a number of the precincts in said fifth congressional district. By the count in this manner the vote of the contestant increased in the various precincts over that of contestee until by this count contestant had increased his vote in the precincts thus counted to overcome the plurality designated by the contestee in the official count. Something like half of the precincts, by this method, were recounted.

The ballots in these various precincts were before the commissioner, but contestant did not have them identified, nor were they offered in evidence. But, over the objection of contestee, the witnesses were directed to count the ballots in the above manner and report the result of the count to the commissioner taking testimony.

The election board, under the law, is presumed to have made correct returns in this election.

Your committee is of the opinion that the primary evidence of the votes cast for the candidates for Representative in the Congress of the United States in this district was the poll books and ballots themselves, and that the official count by the election officers should not be set aside by the testimony of a witness who merely looked at the ballots and testified to the results.

Upon a proper showing and upon the production of the ballots properly protected and preserved, contestant was entitled to a recount of these ballots. But this proof should be established by the best evidence, and the ballots being present should have been offered in evidence as the best evidence in the case. The House will not set aside the official count except upon positive proof that the official count was incorrect.

In order to secure such a recount and warrant the substitution of the results in lieu of the official returns, the committee further hold:

In this case the witness who went through the ballots examined only those in perhaps half of the voting precincts in the district. It has been held that a recount, if had, should include the ballots in all of the precincts in the district.

If it is reasonable to suppose that there was error in counting ballots in certain precincts, it would be equally reasonable to assume that there were errors in counting in the remaining precincts. If any recount is ordered it should be of all of the ballots cast in the district. (*Galvin v. O'Connell*, 61st Cong., Supplement Election Cases, p. 39.)

Where some of the ballots had not been preserved, the committee denied recounting the balance of the ballots. (*Murphy v. Haugen*, 53d Cong., p. 58, Supplement; *Cantor v. Siegel*, 64th Cong., p. 92, Supplement; *Brown v. Hicks*, 64th Cong., p. 93, Supplement.)

The committee can only report cases on the evidence furnished by the parties. We can neither make the evidence nor improve the quality nor supply the deficiency of that furnished. (See *Goode v. Epps*, 53d Cong., Rowell, p. 469.) In this case contestee had a majority of 868 on the returns and received the certificate.

In the case under consideration the ballots were the best evidence of the votes cast for each candidate for Member of Congress. The ballots are not in evidence and are not therefore before the committee. No attempt was made by contestant to offer these ballots to be canvassed by the

committee, but contestant seeks in this case to overthrow the official canvass of the votes by the legally constituted election boards by calling a witness to go through the ballots and report the tally to the commissioner selected by contestant to take testimony.

Where a witness testified that he compared the poll lists, entry lists, or lists of persons struck from the registry list of a county, and presented a list of names which he said were found on the poll list but not on either of the other lists, the committee held that "these statements made by the witness are inadmissible. The papers themselves are the best and only evidence of what they contain if they are admissible for any purpose. The committee must make the comparison and can not take the statements of the witness as to the result of his comparison." (*Finley v. Bisbee*, 45th Cong., Rowell, p. 326.)

Where votes were proved to have been illegal but the evidence that they were cast for contestee was the testimony of persons who had compared the numbered ballots with the poll list, the ballots themselves not being produced in evidence, the evidence was considered insufficient to justify the deduction of the votes from the vote of the contestee. (See *Gooding v. Wilson*, 42d Cong., Rowell, p. 276.)

The recount in this case should have included all of the ballots in all of the precincts in the fifth congressional district. The ballots not having been offered in evidence by contestant, your committee thinks the evidence in this case is not sufficient to set aside the official returns.

There being no grounds under the finding of the committee for setting aside the official count, the usual resolutions, declaring the contestant not elected and confirming the title of the sitting Member to his seat, are recommended.

On March 4, 1923,¹ the resolutions were agreed to without debate or division.

116. The Illinois election case of Parillo v. Kunz in the Sixty-seventh Congress.

Contestant having ignored, without reason or excuse, the plain mandate of the law relative to time of taking testimony, was held to have no standing as a contestant before the House.

Testimony taken in contravention of law can not legally be considered by the House.

Parties to contested election case may not by stipulation set aside explicit provisions of statutes relating thereto.

While the House may for cause extend the statutory time within which testimony may be taken, such extension will be made for good and sufficient reasons only.

On January 14, 1923,² Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the committee in the Illinois case of *Dan Parillo v. Stanley H. Kunz*.

According to the official returns in this case, the sitting Member had received 15,432 votes and the contestant 14,627 votes, a plurality of 805 votes in favor of the sitting Member. The contestant, however, served notice of contest alleging mistakes in the count in 44 of the 107 precincts of the district.

A recount made under stipulations entered into by contestant and contestee revised the return, giving the sitting Member 14,733 votes and the contestant 14,487 votes, a plurality for the former of 246 votes. This recount was attacked by counsel for contestant on the strength of evidence by a handwriting expert,

¹ Journal, p. 346, Record, p. 5469.

² Fourth session Sixty-seventh Congress, House Report No. 1115.

who testified that, in his opinion, some of the pencil crosses on certain ballots were made by persons other than the voters who cast them. The committee did not consider the evidence sufficient to sustain the contention and found no reason for rejecting the vote from the precincts in question.

The principal question raised by the case, however, was occasioned by the failure of contestant to take testimony within the time prescribed by law.

While the statute provided that all testimony should be taken within 90 days, contestant did not begin taking testimony until six months thereafter. Under the law all testimony should have been concluded by April 12, 1921. The parties, however, entered into stipulations extending the time regardless of requirements of the statute and contestant did not as a matter of fact close his case until October 10, 1921.

The committee hold that such evidence can not be considered and say:

Section 107 of the Revised Statutes of the United States as amended by the act of March 2, 1875, explicitly provides that all testimony in contested-election cases shall be taken within 90 days from the date on which the answer of the contestee is served upon the contestant. It has been the invariable practice of the House of Representatives to require the taking of the testimony within the time required by law, except where the time has been extended for good and sufficient reasons.

In the present case the contestant not only does not show due diligence but the record clearly shows that without any reason or excuse whatever he undertook by a series of stipulations to set aside and ignore the clear and explicit provision of the statute. No testimony whatever was taken by the contestant until April 18, 1921, six months after the entire 90 days allowed by the act of Congress for the taking of all the testimony in the case had expired. In this case there is no excuse whatever for the contestant not commencing to take his testimony within 40 days from the service of the contestee's answer as required by law. If he had started to take his testimony immediately after serving his answer, and for good and sufficient reasons had been unable to complete his testimony before the expiration of the 40 days allowed him by law, and had then asked the House of Representatives for an extension of time he undoubtedly would have received an extension. In this case, however, as a matter of fact the record disclosed that he had no reason whatever for asking any extension of time and that all of his testimony might have been taken within the 40 days and that all the testimony on both sides of the case might have been taken within the 90 days required by law.

Your committee, therefore, finds that in this case the contestant deliberately ignored the plain mandate of the law without any reason or excuse, that he has offered no evidence which can legally be considered by your committee, and that he has no standing as a contestant before the House of Representatives.

The committee, therefore, conclude:

Your committee, therefore, finds that the contestant, not having complied with the provisions of the law, governing contested-election cases, has no case which can be legally considered by your committee or by the House of Representatives. Moreover, even if he had fully complied with the law, your committee finds that as a matter of fact he has failed to prove the allegations contained in his notice of contest; that there is no evidence warranting the rejection of any of the precincts of the district; and that the recount of votes, which he alleged would show that he had been elected, according to his own figures, still shows that the contestee was actually elected by a plurality of 246 votes.

For the above reasons your committee recommends the adoption of the following resolutions:

Resolved, That Dan Parillo was not elected a Member of the House of Representatives in the Sixty-seventh Congress from the eighth congressional district of the State of Illinois, and is not entitled to a seat herein.

Resolved, That Stanley H. Kunz was duly elected a Member of the House of Representatives in the Sixty-seventh Congress from the eighth congressional district of the State of Illinois, and is entitled to retain his seat herein.”

On March 4, 1923,¹ the House agreed to the resolutions without debate or division.

117. The Missouri election case of Bogy v. Hawes in the Sixty-seventh Congress.

Parties to a contested election case may be defaulted for noncompliance with the rules of the committee on elections.

Testimony taken ex parte is properly excluded in a contested election case.

Where disputed ballots, even if counted for claimant, would not alter the result of the election the committee on elections declined to inspect the ballots.

Parties to a stipulation are estopped from questioning proceedings taken in conformity with the provisions thereof.

Contestant having agreed to abide by decision of election commissioners is precluded from disputing the result of their count.

The mere fact that candidates for other offices on the same ticket received large majorities while contestant received a minority of the votes cast, does not justify a contest.

Allowance of contestant's attorney fees is not uniform, but each case is decided on its merits.

On July 21, 1921,² Mr. Frederick W. Dallinger of Massachusetts, from the Committee on Elections No. 1, submitted the report in the Missouri case of Bernard P. Bogy v. Harry B. Hawes.

The contestant in this case was a candidate for nomination by his party at the primary held August 3, 1920, but was defeated by a vote of 8,296 to 1,944. After the primary and before the election the nominee died and contestant was given the nomination by the party committee.

In the election the official returns gave the contestant 33,592 votes and the contestee 35,726 votes, a majority of 2,134 votes in favor of the sitting Member.

The contestant in his notice of contest alleged numerous irregularities, and in summarizing his case claimed that 31,125 votes had been illegally counted and improperly accredited to the returned Member.

At the outset of the case a preliminary question arose, as to the compliance of parties with rules adopted by the elections committee.

Early in the history of the House the committee adopted formal rules governing procedure in contested-election cases. At the beginning of the session in which the present case was filed, the committee revised its rules and added with other amendments a new section as follows to be known as rule 3:

RULE 3. Each contestant shall file with his brief an abstract of the record and testimony in the case. Said abstract shall, in every instance, cite the page of the printed testimony on which

¹Record, p. 5472.

²First session Sixty-seventh Congress, House Report No. 281; Record p. 1198.

each piece of evidence referred to in his abstract is contained. If the contestee questions the correctness of the contestant's abstract, he may file with his brief a statement setting forth the particulars in which he takes issue with the contestant's abstract, and may file an amended abstract setting forth the correct record and testimony.

The failure of the contestant to observe this rule is thus commented upon by the committee:

The contestant, entirely ignored this rule and did not file with his brief an abstract of the record and testimony in the case, although the contestee did comply with it. As a result, the committee was obliged to read the entire record, which was full of a very large amount of irrelevant matter. Under the circumstances, the committee might well have defaulted the contestant for noncompliance with the rules of the committee. Inasmuch, however, as this was the first Congress in which this rule has been in operation, the committee has been inclined to be lenient and has considered the case in all its bearings as fully as if the rule had been complied with.

The admission of *ex parte* testimony is also discussed incidentally as follows:

In support of this alleged wholesale illegal registration and voting, no evidence or testimony whatever was offered by the contestant at any time. At the hearing before your committee the contestant offered a sworn affidavit of a lieutenant of police of the city of St. Louis, stating that on March 26, 1921, prior to the city election, he was detailed by the board of police commissioners to investigate false registration in certain wards of St. Louis, and that he compared his canvass of certain precincts in the eleventh congressional district with the registration lists furnished by the board of election commissioners, and that he estimated that there were between 1,000 and 1,200 false registrations in the eleventh congressional district at that time. Inasmuch as this affidavit was entirely *ex parte* and no opportunity was given to the contestee to cross-examine the witness, your committee very properly excluded it in common with several other similar affidavits. This affidavit, like the other excluded affidavits, however, had no probative value or any bearing upon the present contest, as there was no evidence whatever that any of the alleged false registrants voted at the congressional election on November 2, 1920.

While the case was pending before the committee a stipulation was entered into by contestant and contestee providing that "the board of election commissioners should open the ballot boxes used in the eleventh congressional district at the election held on November 2, 1920, and recount the ballots for the office of Representative in the Sixty-seventh Congress for the eleventh congressional district of Missouri."

Under this stipulation the board of election commissioners recounted the ballots and announced that the contestant had received 33,337 votes and the contestee 35,404 votes, a net gain for the former of 67 votes. The contestant attacked this return on the ground that he was not given opportunity to see some of the scratched ballots for the purpose of disputing them.

Both contestant and contestee had been given the privilege of having a watcher at each table where the ballots were counted, and the committee declined to entertain the protest.

The committee held:

At the hearing before your committee, the contestant requested your committee to send for these particular ballot boxes and examine all the ballots. Even if all of the scratched ballots should prove to be in the same handwriting and should be counted for the contestant, it would not alter the result. Moreover, the fact that Republican ballots might be found in these boxes in which the contestant's name was crossed out and the name of the contestee written in, even if the handwriting were the same, would not necessarily be evidence of fraud as under the laws of Mis-

souri, the election officers are permitted to mark the ballots for illiterate voters. For these reasons your committee declined to send for the ballot boxes in question and is of the opinion that on the whole the recount was fairly conducted and that the contestant, having agreed to abide by the decision of the board of election commissioners in regard to all disputed ballots, he is precluded from now questioning the result of the official recount.

In summarizing their findings the committee say:

In this case the contestant apparently feels that because the Republican candidate for President carried the eleventh congressional district of Missouri by a plurality of 2,403 votes, while at the same time he, the Republican candidate for Congress, was defeated by his Democratic opponent by a plurality of 2,067 votes, the result must have been due to fraudulent practices. As a matter of fact, the eleventh congressional district of the State of Missouri has been a Democratic district for many years and under normal circumstances would naturally elect a Democratic Congressman. The fact that the contestee had long been a resident of the district, while the contestant had only recently moved into the district, would easily account for the fact that the former would run ahead of his ticket, while the latter would run behind.

The contestant did not even offer to prove most of the allegations contained in his notice of contest and offered no evidence whatever of any fraud or irregularities in most of the 155 precincts of the congressional district. While, as the committee has pointed out, there is some evidence of occasional violations of the election laws of the State of Missouri, there is no evidence whatever to justify the committee in throwing out the vote of any voting precinct. Your committee believes that considering the very great congestion at the polls due to the voting of women for the first time, the election held in the eleventh congressional district in the State of Missouri on November 2, 1920, was, on the whole, quiet and orderly and fairly conducted. Furthermore, in order to discover any possible discrepancies or evidence of fraud, an official recount was held by the bipartisan board of election commissioners of the city of St. Louis, under a stipulation signed by the contestant and his attorney, that all disputed ballots should be decided by the board. Your committee believes that this recount was fairly conducted and that the official result of the recount showing that Harry B. Hawes, the contestee, was elected by a plurality of 2,067 over his Republican opponent, Bernard P. Bogy, the contestant, in the absence of competent evidence to dispute it, is a fair and accurate expression of the wishes of the voters of the eleventh congressional district of Missouri.

In accordance with their conclusions, the committee unanimously recommend the following:

Resolved, That Bernard P. Bogy was not elected a Representative in this Congress from the eleventh congressional district of the State of Missouri and is not entitled to a seat herein.

Resolved, That Harry B. Hawes was duly elected a Representative in this Congress from the eleventh congressional district of the State of Missouri and is entitled to retain his seat herein.

The report of the committee was submitted on July 21, but on representations by the contestant that additional evidence had been found, consideration of the report was delayed until October 21, 1921,¹ when the following communication was addressed to the contestant:

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ELECTIONS No. 1.
Washington, D.C., October 4, 1921.

BERNARD P. BOGY, ESQ.,
5943 Maple Avenue, St. Louis, Mo.

DEAR SIR: The evidence to which you referred and which you were going to present to this committee on the reconvening of Congress has not been received. Unless it comes to the committee by the 10th of October, I shall be obliged to call up the case in the House on October 17.

FREDERICK W. DALLINGER.

¹Record, p. 6557.

No reply having been received from the contestant, Mr. Dallinger called up the report on October 20, 1921.¹

During the discussion Mr. Dallinger, in response to an inquiry as to whether the contestant would receive attorney's fees, said:

Of course, that is entirely a matter for the Committee on Elections, the Committee on Appropriations, and the House to determine.

Each case is considered on its merits. Since I have been a member of the Committee on Elections No. 1, we had before us a South Carolina case where we did not allow the contestant any attorney's fee. That was a case where the contestant had brought a frivolous contest in several preceding Congresses.

We also had a case from New York in which the contention was that the use of the voting machine was unconstitutional. In that case we declined to allow the contestant any attorney's fees.

The adoption of these resolutions settling the title to the seat in Congress does not necessarily involve that, because that is a matter which is to be determined hereafter.

After brief debate the resolutions recommended by the committee were agreed to without division.

¹Journal, p. 494; Record, p. 6555.