

Chapter CLXX.

GENERAL ELECTION CASES, 1921 TO 1923.

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152. The election case of John P. Bracken of Pennsylvania.

In the event of the death of a Member-elect from the State at large, the candidate receiving the next highest number of votes is not entitled to the seat.

An instance of adverse action on a memorial presented by a person claiming to have been elected to the House of Representatives.

On July 14, 1921,¹ Mr. Robert Luce, of Massachusetts, from the Committee on Elections No. 2, submitted the report of the committee in the Pennsylvania case of John P. Bracken.

The case was initiated through a memorial presented by John P. Bracken, a citizen of Pennsylvania, claiming to have been elected to the House of Representatives of the Sixty-seventh Congress.

At this election four Members of the House of Representatives were to be elected at large. Between the day the votes were cast and the completion of the canvass, Mr. Mahlon M. Garland, one of the four receiving the largest number of votes, died. The memorialist, John P. Bracken, stood fifth on the list.

In the debate in the House Mr. Luce explained that the memorialist relied on certain decisions by State courts, among them the decision in the case of *Morris v. Bulkeley*,² in which the court said:

The election of State officers in this State is a process. It includes the preliminary registration, by which those persons who have the right to vote are determined; the time when, the place where, and the manner in which the votes are to be given in, and also the manner in which the votes are to be counted and the result made known. Each of these steps must be taken in pursuance of the law existing at the time the election is had. That part of the election process which consists of the exercise by the voters of their choice is wholly performed by the electors themselves in the electors' meetings. That part is often spoken of as the election. But it is not the whole

¹First session Sixty-seventh Congress, House Report No. 265; Record, p. 2033.

²61 Conn., pp. 287, 359.

of the election. The declaration of the result is an indispensable adjunct to that choice, because the declaration furnishes the only authentic evidence of what the choice is.

The committee, however, held:

Upon the canvass of votes cast in the State of Pennsylvania November 2, 1920, Hon. Mahlon M. Garland was declared to have been elected as one of the four Representatives at large in Congress from that State. Before the completion of the canvass Mr. Garland died. Mr. Bracken received the highest vote given to any candidate not declared to have been elected. In the judgment of your committee this state of facts does not warrant the conclusion that Mr. Bracken was elected, and therefore the committee recommends the passage of the following resolution:

Resolved, That John P. Bracken was not elected a Representative at large to the Sixty-seventh Congress from the State of Pennsylvania."

The case was perfunctorily debated in the House on October 20, 1921,¹ when the resolution recommended by the committee was agreed to without division.

153. The Alabama election case of Kennamer v. Rainey in the Sixty-seventh Congress.

The contestant failing to produce evidence sustaining charges made in notice of contest, the House confirmed the title of the sitting member to his seat.

On October 31, 1921,² Mr. Cassius C. Dowell, of Iowa, from the Committee on Elections No. 3, submitted the report of the committee in the Alabama case of Charles B. Kennamer v. L. B. Rainey.

The sitting Member had been returned by an official majority of 739 votes.

The contestant charged that the state officials, including the governor and members of the State legislature, had conspired to delay legislation authorizing the registration of women voters, and had delayed the appointment of registrars.

The committee find:

The proclamation of the ratification of the woman's suffrage amendment was made on August 26, 1920. The governor issued a call for a special session of the legislature on August 28, 1920, to convene on September 14, 1920. The record shows that the legislature convened on the 14th day of September, 1920, in special session, and the legislation referred to was completed and signed by the governor on October 2, 1921, which was the last day of the extra session. It appears that other legislation was considered and acted upon by the legislature during this time.

Your committee do not find the charge of conspiracy to delay this legislation and to delay the appointment of registrars to be sustained by the evidence.

Testimony submitted by the contestant to show that a number of women who would have voted for him were not permitted to register is also held by the committee to be too indefinite and uncertain to sustain the charge.

After full consideration of the case the committee conclude:

Your committee find from a careful inspection of the evidence that some persons were registered unlawfully, and the evidence shows that a small number not legally entitled to vote voted for the contestee, Mr. Rainey; but the testimony does not show that the number of votes cast of those who were not properly registered and who were not legally entitled to vote materially affected the result of the election.

¹ Journal, p. 494; Record, p. 6564.

² First session Sixty-seventh Congress, House Report No. 453; Record, p. 7058.

While there were some other irregularities, and perhaps violations of the law in some instances, the evidence does not disclose that these irregularities or violations affected the result of the election in this district. Neither does the evidence disclose that the persons who failed to vote in said district were deprived of their right to register and vote, nor is it shown by competent evidence that they offered to register or vote.

On the whole case the official returns show that contestee, L. B. Rainey, received a majority of 739 votes, and the evidence submitted in this case does not sustain the charges of the contestant that contestant should be declared elected.

The committee therefore recommend the usual resolutions declaring the contestant was not elected and confirming the title of the sitting Member to his seat.

The case was called up in the House on November 2,¹ and after a short statement by Mr. Dowell, the resolutions were agreed to without division.

154. The North Carolina election case of Campbell v. Doughton in the Sixty-seventh Congress.

Discussion of methods of determining the domicile of a voter.

In the absence of fraud, electors may not be deprived of their vote by omission of election officers to perform duties imposed upon them by law.

Unfair campaign tactics directed at one candidate may not be taken as the basis of a contest in behalf of another candidate on the same ticket.

When performance of a statutory duty is within the discretion of an election official and its performance is accompanied by no denial of right, such performance may not be impeached on the score of partiality.

On April 2, 1922,² Mr. Robert Luce, of Massachusetts, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the North Carolina case of James I. Campbell v. Robert L. Doughton.

The sitting Member had been returned by an official majority of 1,088 votes.

The election laws of the State of North Carolina provided that electors absent from the precinct in which they were entitled to vote, or physically incapacitated from going to the polls, might vote by mail. The law originally specified a form of certificate to accompany such ballots and provided that certificates and ballots should be preserved by the proper officials for six months after the elections.

The contestant charges gross irregularities through the counting of ballots accompanied by fraudulent certificates and their destruction in violation of the statute as soon as counted.

The majority deem the evidence submitted by contestant insufficient to establish his contention.

As to uncertainty of domicile:

The committee does not think the charges are borne out by the evidence. The difficult problem of domicile, so greatly involving in its determination the question of intent, seems on the whole to have been met by the local officials with as much fairness and wisdom as could have been reasonably expected, and the testimony presents little if any suggestion of conscious misfeasance. In the case of new registrations a registrar is rarely in position to question the applicant's declaration of intent. In the case of voters already on the roll the declaration in the certificate accompanying the ballot of an absentee, that he is "a qualified voter," seems virtually to preclude the officials at the polls from rejecting the ballot on the ground that the absentee has abandoned his residence.

¹Journal, p. 514; Record, p. 7214.

²Second session Sixty-seventh Congress, House Report No. 882: Record, p. 5183.

The practical effect is to postpone inquiry until the result of the election is contested. Such inquiry must then be largely confined to persons other than the absentee voters themselves, as it turned out in the present case. The testimony of such other persons must be largely opinion testimony, which is always of doubtful weight. For this reason it was held in *Lowe v. Wheeler*, Forty-seventh Congress, that the mere statement of a witness that an elector is a nonresident is insufficient; the witness must give facts to justify his opinion. Furthermore, lack of acquaintance on the part of a single witness will not be adequate proof. In *Letcher v. Moore*, Twenty-third Congress, the committee unanimously adopted as a rule of decision "that no name be stricken from the polls as unknown upon the testimony of one witness only that no such person is known in the county." This becomes of all the more importance in the case of absentee voters because they are so often persons who are little at home and who may indeed have passed most of the time away for years. If these things be borne in mind, much of the contestant's testimony aimed at the absentee vote will be found to fall to the ground.

The committee further find that only about 175 absentee votes are specifically questioned and the number is so small that the rejection of all of them would not change the result of the election.

The contestant, however, insists that all absentee votes cast should be rejected because of the failure to preserve the ballots and certificates.

The statute¹ on which he relies is as follows:

In voting by the method prescribed in chapter 23 of the Public laws of 1917 the voter may, at his election, sign, or cause to be signed, his name upon the margin or back of his ballot or ballots, for the purpose of identification. The ballot or ballots so voted, together with the accompanying certificates, and also the certificates provided in section two of this act, in case the voter ballots by that form, shall be returned in a sealed envelope by a registrar and poll holders, with their certificates of the result of the election and kept for six months, or, in case of contest in the courts, until the results are finally determined.

The majority claim the statute had been so amended as to obviate this requirement, and explain:

This was in an act ratified March 11. On the previous day had been ratified the work of a commission that had been engaged in revising and consolidating the public and general statutes, and it had been provided that the commissioners should insert the enactments of the current general assembly, with proper technical changes "and make such other corrections which do not change the law as may be deemed expedient."

The Consolidated Statutes were to be in force from and after August 1. When they appeared, they contained this provision (sec. 8101):

"All public and general statutes passed at the present session of the general assembly shall be deemed to repeal any conflicting provisions contained in the Consolidated Statutes."

From all this it is evident that when the commissioners dropped from section 4a of chapter 322 the words italicized in the section as quoted above, they could not change the purport of the original provision; could not legitimate any interpretation of the section other than the natural interpretation of the original phraseology.

This confutes the argument that the word "so" in the phrase, "The ballot or ballots so voted, together with accompanying certificates," refers back to all the absentee ballots and certificates. Otherwise there would be no significance in the word "also" in the phrase omitted by the commissioners. It is clear, then, that the actual law required the keeping of only the ballots signed for the purpose of identification. Such was the interpretation generally given to it by the election officials of both parties.

¹Section 4a of Chapter 322 of the Public Laws of 1919.

It was an interpretation buttressed by the fact that the laws of North Carolina make no provision for the preservation of main election ballots in general; and that no apparent gain would result from segregating at any rate such unmarked ballots as were sent in by the absentee.

It is clear that failure to preserve the certificates by which a straight party ballot was cast was a violation of the actual law, but it is to be remembered that the phraseology of what purported to be the law, as contained in the Consolidated Statutes and in the extract therefrom printed as a pamphlet entitled "Election Law," which undoubtedly the election officials commonly relied upon, might fairly be construed to mean that only the certificates accompanying marked ballots were to be kept. Election officials can not reasonably be expected to unravel the technical difficulties found in such a situation as this. Indeed, as far as they grow out of the changes made by the commissioners who consolidated the statutes, their very existence was left to your committee itself to ascertain and disclose.

Even if errors were committed in this matter by the election officials, it is well established that "in the absence of fraud the voter can not be deprived of his vote by the omission of election officers to perform the duties imposed upon them by law."

It was charged by the contestant that at Furr and Big Lick precincts voting was purposely delayed and preference was given those who desired to vote for the contestee.

The minority views, filed by Mr. John L. Cable, of Ohio, claim that the opening of the polls in the Furr precinct was delayed at least an hour and a half and quote the report in the case of *Yates v. Martin* in the Forty-sixth Congress, holding that failure to open the polls on time shifted the burden of proof to the party seeking to uphold the election, to show that the result was not affected. It is claimed that in these two precincts 254 electors, who would have voted for the contestant, and only 24 who would have voted for the contestee, were deprived of the opportunity to vote. This vote alone, if counted, the minority views contend, would have given the contestant a majority of all the votes cast in the district.

The majority decide, however:

In two precincts of Stanly County (Big Lick and Furr) the conduct of the polling was not inconsistent with the possibility of conspiracy. Insufficient accommodation was provided for the voters; apparently the crowd was not handled with ordinary skill; there were instances of delay that might well have aroused suspicion. On the other hand although the total vote polled was much less than in sundry other precincts, and it was charged that 264 voters were unable to vote before the polls closed at sunset, yet in one case 750 and in the other 695 ballots were cast, more than one a minute, leaving no ground to infer conspiracy simply from the total of the figures. The weight of the evidence showed no discrimination, except in favor of the women and most of the elderly men, who regardless of party were given precedence. Although as these precincts were strongly Republican, the loss fell chiefly on the Republican ticket, yet Democrats suffered as well as Republicans, and it is hard to believe that men would deliberately plan to deprive their own partisans of exercising the right of suffrage in the hope that a larger number of their opponents would be shut out. Direct evidence of conspiracy was wholly lacking, and the circumstances could be explained as due to the inefficiency of election officials.

Another issue raised was the circulation of literature, aimed at another candidate on the same ticket with contestant, and calculated to arouse undue prejudice. The majority, while strongly condemning such tactics, do not consider the interests of other candidates on the ticket sufficiently prejudiced by such attacks to warrant interference by the House, and declare:

Language strong enough for the censure of such methods of campaigning is hard to find, but it would be unwise to say that because of a vicious attack, wholly indefensible, aimed at a

candidate for one of the various offices to be filled at an election, candidates for other offices should be imperiled.

As to charges of discrimination in the registration of voters the majority say:

In North Carolina the law requires the attendance of registrars at the place of registration on the four Saturdays preceding an election, and permits the registrars at any other time to register elsewhere. The contestant averred unfairness by registrars when away from the registration places, in that they would then devote their energies mainly to registering voters of their own faith, to the neglect of voters of opposite faith. If there was violation of law in this particular, it was to be found only in disregard of that part of the oath taken by the registrar which imposed on him the duty of acting "impartially." Undoubtedly a registrar would have been delinquent if he had refused to register any qualified voter presenting himself at the registration place on the appointed days, for registration was then obligatory. To register elsewhere and at other times was wholly permissive. Where it is altogether within the discretion and pleasure of an official whether an act shall be performed at all, and its performance is accompanied by no denial of rights, can the act be impeached on the score of partiality? No voter in North Carolina has either an inherent or a statutory right to be registered away from the registration place. If there was neglect to give any voter an opportunity that in fact was within the discretion of the official concerned, it can not be treated as partiality from the legal point of view.

Complaint was made that in various instances friends of the contestant were impeded in getting access to registration books in time to make proper inquiry as to ground for preferring challenges on challenge day or at the polls. However, even putting the worst face on the episodes cited, the offenders, if they were such, generally kept within the letter of the law, and the exceptions were neither considerable nor important enough to be given much weight in the balancing of considerations.

155. The election case of Campbell v. Doughton, continued.

Where voting by electors who had not paid a poll tax, although in violation of the State constitution, was permitted by common consent, the committee strongly condemned the practice but did not recommend rejection of such voters.

Where provisions of the State constitution forbidding registration unless able to read and write were generally ignored, the committee, in an inconclusive case, censured the procedure but did not recommend invalidation of the vote.

Where acts violative of the provisions of a State constitution do not appear to have changed the result, the House is not justified in declaring the seat vacant.

Failure to enforce the provisions of a State constitution, when acquiesced in by candidates and electors without heinous circumstances or injustice and without effect in altering the result, does not of itself suffice to vitiate the election.

Instance wherein final action was not taken in an election case.

Violations of requirements embodied in the State constitution, making prepayment of poll taxes and ability to read and write qualifications for voting, are discussed by the majority at length.

Relative to the prepayment of poll taxes as a qualification the majority say:

The constitution of the State required, with certain exceptions, the prepayment of poll taxes as a qualification for voting. The requirement was in general disfavor, and indeed at this very election was taken out of the constitution. Nevertheless, it was at the time a living thing and

should have functioned universally and impartially. It did not so function. In one county, by definite agreement between the organizations of both parties, the law was not enforced at all. Throughout the district it was not enforced against men in the military service, justification being supposedly found in an opinion of the attorney general of the State which held that such men might be exempted. In many other instances enforcement or refusal to enforce was more or less arbitrary and accidental, seeming to depend on the whim of the officials or the sentiment of the locality. Of course this opened wide the door for abuse, and abuse walked in. Each side contends that many votes improperly cast accrued therefrom to the benefit of the other. To determine the facts and strike a completely accurate balance would be impossible without prolonged and exhaustive individual inquiry on the spot, and even then the lack of certain records would so embarrass investigation as to cloud its results. For example, in Iredell County, where it was agreed that the poll-tax requirement should not be enforced, the sheriff did not certify the list of those who had paid, as required by law. This might entail individual inquiry as to the legality of every vote cast in the county. Furthermore, that would be of no avail unless the voters were compelled to disclose the character of their votes, which raises the mooted question of violation of the secrecy of the ballot. Indeed, the situation is so confused that the contestant asks us to throw out the whole vote of the county. Such drastic treatment does not seem to us called for by the circumstances. The contestant saw fit not to rely solely upon his request, but proceeded with examination of many Iredell County witnesses in this particular, and we deem it sufficient to content ourselves with their testimony and that of witnesses for the contestee in the same field. The same course has been pursued in respect of the contentions about votes said to be invalid because of nonpayment of poll taxes in the other counties and of absentee votes as well as of those personally cast.

The question of literacy qualifications is then discussed:

The constitution of the State requires, with exceptions not now of material consequence, that every person presenting himself for registration shall be able to read and write. As in the case of the poll-tax provision, this requirement was extensively ignored. In certain parts of the district the people seem to have been unanimous in the opinion that their judgment in this particular was above the constitution. Each side contends that as a consequence the other gained many votes with which it ought not to have been credited. Here, too, an attempt to determine the facts with complete accuracy would require lengthy and laborious inquiry on the spot, with little promise of satisfactory conclusion, and we have thought it sufficient to rely on the testimony.

These kindred contentions, relating to constitutional requirements in the matter of poll-tax and literacy qualifications, furnish the main question of principle involved in this case. It will be seen to differ from the usual contest in that the important complaint is not of restraint of suffrage, nor its improper extension on a large scale without the knowledge or consent of a candidate or his adherents, but of such an extension made with common knowledge and general consent. Strictly speaking, there is no difference in effect between the suppression of votes and their nullification by offsetting votes illegally cast. The question here is whether the approval, avowed or tacit, by the candidates and their adherents, prior to the conclusion of the election, alters the situation.

This question is restated and answered in the following form:

When an electorate deliberately and with common consent disregards the provisions of a State constitution to an extent clouding the result, has there been a valid election?

It is a question of much perplexity. On the one hand there is grave danger in encouraging the belief that a constituency may violate constitutional injunctions with impunity. On the other hand there is grave doubt whether Congress may properly mete out punishment where there is no clear and convincing proof that the will of the constitutional majority has been thwarted. Balancing these considerations, your committee has concluded, though not without misgivings, that when acts alleged to have violated the provisions of a State constitution do not, appear to have changed the result, either by themselves or in combination with statutory misdemeanor, the House is not justified in declaring a seat vacant.

This neither excuses nor palliates the conduct in question. We have no hesitation in declaring that it was reprehensible. Respect for law and observance of constitutions are essential to the safety of our common rights. If either basic or secondary law ceases to represent the will of the majority, it should be annulled or changed, but while it stands, it should be enforced. We are not called upon to consider what may be the duty of the State itself in the way of prevention or penalty. Our position simply is that failure to enforce the provisions of a State constitution, a failure generally approved or acquiesced in by candidates and electors, without conscious defiance of authority, and without heinous circumstances, resulting from no wish or intent to work injustice, and not proved to have altered the result, will not in and of itself suffice to vitiate an election to the House of Representatives.

Accordingly the majority conclude that, even with liberal allowance of the contestant's claims, the sitting Member would still have a majority of the votes cast in the district. They therefore recommend resolutions declaring the contestant was not elected and confirming the title of the contestee, while the minority views recommend resolutions to the contrary.

The case was debated on May 27.¹ After much difficulty in maintaining a quorum, the House adjourned before debate was concluded. The case was not again considered by the House, and Mr. Doughton continued to occupy the seat.

156. The Senate case relating to qualifications of Rebecca Latimer Felton, of Georgia, in the Sixty-seventh Congress.

Discussion as to the term of service of a Senator appointed by a State executive to fill a vacancy.

The first woman to sit in the Senate.

On October 3, 1922, during recess of Congress, Rebecca Latimer Felton was appointed Senator from Georgia by the governor of that State, to fill a vacancy occurring in the Senate by the death of Thomas E. Watson. At the election held November 7, Walter E. George was elected to fill the unexpired term.

The third session of the Sixty-seventh Congress commenced November 20, and on the following day,² while credentials were being presented, Mr. William J. Harris, of Georgia, said:

Mr. President, after the death of my late colleague, Thomas E. Watson, the governor of my State appointed as his successor Mrs. Rebecca Latimer Felton. Her credentials were sent to the Secretary of the Senate and have been here for some days. I hope no Senator will object to her taking the oath of office. The Senator elect from Georgia, Hon. Walter F. George, very generously and very graciously has withheld his credentials in order that Mrs. Felton may take the oath and, as I said, I hope no Senator will object. This will not in any way prejudice Mr. George's claim to his seat in the Senate, to which the people of my State have elected him, and his credentials will be presented to-morrow.

Discussing at length the question raised by Mrs. Felton's attendance in the Senate as the appointee of the governor of the State after the issuance of a certificate of election to the Senator elect elected to fill the vacancy to which she had been appointed, Mr. Thomas J. Walsh, of Montana, said:

I have said this much because I did not like to have it appear, if the lady is sworn in—as I have no doubt she is entitled to be sworn in—that the Senate had so far departed from its duty in the premises as to extend so grave a right to her as a favor, or as a mere matter of courtesy,

¹Second session Sixty-seventh Congress, Journal, p. 389; Record, p. 7808.

²Third session Sixty-seventh Congress, Record, p. 8.

or being moved by a spirit of gallantry, but rather that the Senate, being fully advised about it, decided that she was entitled to take the oath.

Mrs. Felton's credentials having been presented, the oath was administered and she took her seat, the first woman¹ to sit in the Senate.

On the following day the credentials of Mr. Walter F. George, as Senator elect, were presented and he took the oath.

On November 23, 1922² in the Senate, following the approval of the minutes, Mr. Walsh said:

Mr. President, there was introduced on yesterday by the senior Senator from Georgia, Mr. Harris, a Senate resolution reading as follows:

“Resolved, That the Secretary of the Senate be, and he hereby is, authorized and directed to pay from the contingent fund of the Senate to Rebecca Latimer Felton \$287.67 for compensation, and \$280 as mileage, the same being amounts due her as a Senator from the State of Georgia from November 8 to November 21, 1922.”

The resolution was appropriately referred to the Committee to Audit and Control the Contingent Expenses of the Senate. I hope, however, that the resolution will not be adopted by the Senate. I trust that we shall not throw further confusion into the matter by now exhibiting some doubt as to whether Mrs. Felton was really a Member of the Senate from November 8 to November 21. If she were a Member—and the Senate so decided by admitting her and swearing her in—she is to be paid out of the regular appropriation, as is every other Senator. This is not a matter which should be charged against the contingent fund of the Senate. If the appropriations do not cover the item, it will be very proper for the Committee on Appropriations to bring in a deficiency item in the deficiency bill to take care of it. The payment should be made as the

¹The first woman to sit in the Congress of the United States was Miss Jeannette Rankin, elected to the House of Representatives in the Sixty-fifth Congress from the State of Montana at large. No woman was returned to the Sixty-sixth Congress, but women have occupied seats as Members of each succeeding Congress as follows:

In the Sixty-seventh Congress: Mrs. Rebecca Latimer Felton, appointed to the Senate from the State of Georgia; Miss Alice Mary Robertson, elected to the House from the second district of Oklahoma; Mrs. Winnifred Mason Huck, elected to the House from the State of Illinois at large to fill the vacancy occasioned by the death of her father; and Mrs. Mae E. Nolan elected to the House from the fifth district of California to fill the unexpired term of her husband.

In the Sixty-eighth Congress: Mrs. Mae E. Nolan, elected to the Sixty-eighth Congress, at the same election in which she was returned to the Sixty-seventh Congress.

In the Sixty-ninth Congress: Mrs. Mary T. Norton, elected to the House from the twelfth district of New Jersey; and Mrs. Florence P. Kahn, from the fourth California district, and Mrs. Edith Nourse Rogers, from the fifth Massachusetts district, each elected to the vacancy occasioned by the death of her husband.

In the Seventieth Congress: Mrs. Pearl Peden Oldfield, of Arkansas; Mrs. Kahn; Mrs. Rogers; Mrs. Katherine Langley, of Kentucky; and Mrs. Norton.

In the Seventy-first Congress: Mrs. Oldfield; Mrs. Kahn; Mrs. Ruth Bryan Owen, of Florida; Mrs. Ruth Hanna McCormick, of Illinois; Mrs. Rogers; Mrs. Langley; Mrs. Norton; and Mrs. Ruth Baker Pratt, of New York.

In the Seventy-second Congress: Mrs. Hattie W. Caraway, of Arkansas, appointed to succeed her husband and subsequently elected, the second woman to sit in the Senate and the first to be elected to that body; Mrs. Effiegene Wingo, of Arkansas; Mrs. Kahn; Mrs. Owen; Mrs. Rogers; Mrs. Norton; Mrs. Pratt; and Mrs. Willa B. Eslick, of Tennessee.

In the Seventy-third Congress: Mrs. Caraway; Mrs. Isabella Greenway, of Arizona; Mrs. Kahn; Mrs. Virginia E. Jenckes, of Indiana; Mrs. Kathryn O'Loughlin McCarthy, of Kansas; Mrs. Rogers; and Mrs. Norton.

²Record, p. 47.

payment of the salaries of all Senators is made, not out of the contingent fund of the Senate, but out of the regular fund.

It occurs to me that the manner proposed in the resolution is not the proper way to take care of this particular item. I feel like saying that it would throw a very grave doubt upon the action taken by the Senate in seating Mrs. Felton as a Senator.

The resolution was agreed to,¹ however, and mileage and compensation for the same period were paid to Mr. George from the regular appropriation.

157. Senate election case of Smith W. Brookhart in the Sixty-seventh Congress.

Although the fact of election was unquestioned, a Senator-elect delayed attendance until credentials were received.

Credentials being delayed, a Senator appointed by a State executive continued to serve after another had been elected to fill the vacancy.

Charles A. Rawson, Senator from Iowa, was appointed by the Governor of Iowa, February 21, 1922, to fill a vacancy in the Senate occurring by the resignation of William S. Kenyon, and took his seat February 23.² Under these credentials Mr. Rawson held his seat during the remainder of the second session of the Sixty-seventh Congress, ending September 22, 1922.

On November 7, 1922, Smith W. Brookhart was elected to fill the unexpired term. Under the election laws of the State of Iowa,³ election boards are allotted twenty days in which to canvass returns and certificates of election may not issue prior thereto. The third session of the Sixty-seventh Congress commenced on November 20, and in the absence of Mr. Brookhart's credentials, which under the State law could not be issued prior to November 27, Mr. Rawson attended as the junior Senator from Iowa and continued to serve until December 2,⁴ when Mr. Brookhart's credentials arrived and were presented.

On December 7, 1922,⁵ the following resolutions were agreed to by the Senate:

Resolved, That the Secretary of the Senate be, and he hereby is, authorized and directed to pay out of the contingent fund of the Senate to Hon. Charles A. Rawson \$493.15, salary from November 8, 1922, to December 1, 1922, both dates inclusive, and \$459.20, mileage for attendance at the third session of the Sixty-seventh Congress, said sums being due him as a Senator from the State of Iowa.

Resolved, That the Secretary of the Senate be, and he hereby is, authorized and directed to pay out of the contingent fund of the Senate to Roy H. Rankin \$182.67 and to Edna T. Vovo, \$122.67, for clerical services rendered the Hon. Charles A. Rawson, a Senator from the State of Iowa, from November 8, 1922, to December 1, 1922, both dates inclusive.

Salary and mileage due Mr. Brookhart, and compensation due his clerks, from November 8, 1922, to December 1, 1922, inclusive, were disbursed from the regular appropriations provided in the legislative bill for the current year.

158. The Virginia election case of Paul v. Harrison in the Sixty-seventh Congress.

¹ Record, p. 452.

² Second session Sixty-seventh Congress, Record, p. 2987.

³ Section 877, Iowa Revised Statutes, 1924.

⁴ Third session Sixty-seventh Congress, Record, p. 440.

⁵ Fourth session Sixty-seventh Congress, Record, p. 179.

Requirements of State constitution that voters be registered on application in their own handwriting only, held to be mandatory and registration of voters, without written application as provided by State constitution is void.

Votes of persons assisted in the preparation of their ballots, in violation of the provisions of the State constitution, are void and should not be counted.

Defective applications for registration, when once received by registrar and supplemented by examination under oath, are not void but merely voidable, under the Virginia law, and votes cast under such registration should not be rejected.

Votes of persons failing to pay poll taxes as required by State constitution should not be counted.

On June 14, 1922,¹ Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the majority of the committee in the Virginia case of John Paul *v.* Thomas W. Harrison.

The sitting Member in this case was returned by an official majority of 448 votes. The contestant sets forth numerous grounds of contest which are summarized in the report under three heads:

One. That a large number of persons voted at this election who were not lawfully registered, and therefore under the constitution of Virginia were not qualified to vote, and that if the votes of these persons were eliminated the contestant would be elected.

Two. That a number of persons voted at this election without paying their poll tax, as required by the constitution and laws of Virginia, and that if the votes of these persons were eliminated together with the other facts in the case, the contestant would be elected.

Three. That the conduct of the election in certain precincts of the district was marked by such reckless disregard of the provisions of the constitution and laws of Virginia that the returns from those precincts do not represent the expression of the will of the people; that there was no valid election in those precincts, and therefore the returns from them should be thrown out, in which case the contestant would be elected.

(1) **Illegal registration:**

Under section 18 of the constitution of the State of Virginia no one is allowed to vote who has not been registered as provided in section 20. Requirements on the voter for registration are as follows:

1. That he has personally paid to the proper officer all State poll taxes assessed or assessable against him, under this or the former constitution, for the three years next preceding that in which he offers to register; or, if he came of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid \$1.50, in satisfaction of the first year's poll tax assessable against him.

2. That, unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for two years next preceding, and whether he has previously voted; and if so, the State, county, and precinct in which he voted last.

3. That he answer on oath any and all questions affecting his qualifications as an elector submitted to him by the officers of registration, which questions and his answers thereto shall be reduced to writing, certified by the said officers, and preserved as a part of their records.

¹Second session Sixty-seventh Congress, House Report No. 1101, Record, p. 8733.

The majority report thus reviews this phase of the case:

In the voluminous record in this case there is evidence of hundreds and even thousands of cases of persons who were registered although no applications at all had been filed with the registrar. There are also numerous instances in the record where assistance was given to applicants for registration, either by the registrar himself or by some third person. In addition to this the contestee introduced in evidence a large number of cases of persons who were placed on the registration list whose applications were not in strict conformity with the requirements of the constitution.

Both the contestee and his counsel contended that these provisions of the constitution were merely directory and not mandatory, and that the votes of persons not registered in conformity with the constitution could not be questioned at the election, the only remedy being to have the names of persons thus illegally registered stricken from the voting list previous to the election as provided in the constitution. On the other hand the contestant and his counsel contended that these provisions of the constitution being mandatory on the legislature of the State are also mandatory on the registration and election officials; and that where application is filed the registrar acquires no jurisdiction and the vote of any person placed on the registration list in the absence of such application is void ab initio.

The committee is firmly of the opinion that the great weight of authority sustained the contention of the contestant.

After citing authorities in support of their views, the majority continue:

It is true that in Virginia were all members of the party to which the contestee belonged, and they testified that they registered the voters whose names were inquired of without requiring any written applications as required by the constitution. In a large number of the precincts registrars testified that they had never received any written applications during their entire terms of office. The committee finds that there were almost 1,900 cases of such illegal registration of persons whose names were set out in the contestant's notice and in the contestee's answer. In addition there were almost 31,200 additional cases of void registrations not set out in the notice and answer but shown by the evidence, making a total of over 5,000 cases of persons who voted at the last congressional election in this district whose registration and therefore whose votes were invalid. In its consideration of the evidence the committee has in the first instance confined itself to the names set forth in the notice and answer on the theory that where the parties in their pleadings set up particular names they should be strictly held to the names set forth in the pleadings.

The contestant further contended that the votes of persons who were assisted in making their applications, either by the registrar or by other parties, are equally void ab initio and should not be counted. In view of the fact that the constitution provides that the voter must make application "without aid, suggestion, or memorandum, in the presence of the registration officer," the committee is of the opinion that this contention is sound, as the written applications in such cases would not be the applications of the voters themselves.

While the contestee vigorously contended throughout the taking of the testimony and at the hearings before the committee that all the votes of persons registered contrary to the provisions of the constitution should be counted on the ground that the registration could not be attacked collaterally, he also contended that if the committee should decide against him, all applications which did not strictly contain all the information set forth in the constitution should be treated in the same manner, and he had placed in the record a large number of alleged defective applications.

The committee has examined with care the applications in the cases of all persons whose names were set forth in the contestee's answer and finds that a very large number of the applications contain all the information required by the second clause of section 20 of the constitution. In the case of a considerable percentage of the applications which are technically defective the voters, mostly women, voting for the first time under the nineteenth amendment to the Federal Constitution, have simply neglected to state that they had never before voted, a fact of which any court might well take judicial notice. The contestant contends that it would be absurd to place such defective applications in the same category as cases where no applications were filed

or where assistance was given, and cites the analogy of the validity of a judgment, even though the notice, in a court of record, is grossly defective in form, once the court has acted on it and when judgment is given. He also calls attention to the fact that, although a notice in a suit is defective, amendments are invariably allowed by the courts whenever the interests of justice demand.

The committee is of the opinion that this analogy is sound. As Judge McLemore well says in the Suffolk Local Option Election case (17 Va. Law Reg. 358) "the registrar has no jurisdiction in the premises until there has been an application as specifically provided by the constitution." The fact that the third paragraph of section 20 of the Virginia constitution provides for an examination under oath of the applicant by the registrar as to his qualifications, implies that the written application might not contain all of the required information; otherwise the registrar would not need to ask the applicant any questions but could from the application itself, after having sworn the applicant, make the proper entries on the registration book. If, however, the written application is imperfect then the registrar can put the name of the applicant on the registration book after asking him questions as to his qualifications. In other words, while the registrar has no authority under the constitution to ask any questions or to do anything else until a written application has been made to him by a person in his own handwriting, without aid, suggestion, or memorandum, when such application has been made, however defective it may be, then the registrar has jurisdiction to act, and he can ask the applicant any questions about his qualifications to vote, the registrar in such cases being required to reduce such questions and answers to writing and to preserve them. Consequently the committee is of the opinion that defective applications when once received by a registrar, under the Virginia law are not void but merely voidable, and the vote of a person registered on such an application supplemented by the examination under oath by the registrar should not be thrown out in an election contest.

On this point the contestant maintained, that registration of voters by the registrar was conclusive; that even though registrars put on the registration books the names of persons who had not made application to register as prescribed by law, which was denied, and in respect to which the contestee called for strict proof, the votes of such persons should not be rejected, and the right of such persons to vote could not be collaterally attacked in this proceeding, but the names of such persons should have been stricken from the registration list as provided by section 107 of the Code of Virginia. The minority views, signed by Messrs. C. B. Hudspeth and A. L. Bulwinkle, assert in approval:

At practically every precinct in the district in respect to which evidence was taken concerning the action of the registrar at such precinct the registrar acted fairly and impartially and did not discriminate against either the contestant or the contestee, and that so far as registration is concerned the contestant has no ground of complaint. The registrars can not be criticized for their refusal to register any applicants for registration, and the contestant has no ground of complaint on that score. An examination of the record shows that the entire number of instances throughout the district where the registrars refused registration to applicants does not exceed 66, and such refusal was for the most part based upon the inability of the registrant to read or write, or to make any sort of application, or failure to have paid the requisite poll taxes or insufficient residence in the State or county. The only other ground for complaint against the action of the registrars must be based upon the contention of laxity or liberality on the part of registrars in registering persons not entitled to be registered. There is no evidence in the record to bear out this contention.

(2) Nonpayment of poll taxes:

The constitution and laws of the State of Virginia prescribe, as a qualification for voting, the payment of a poll tax. There was little disagreement as to findings of fact relating to charges that persons who had not paid such tax had been allowed to vote, and the majority say:

Both parties in the present case agree that the votes of persons who have failed to pay their poll taxes, as required by the constitution, should not be counted in determining the result of the election. While a great deal of space in the printed record and in the briefs is taken up with this question of poll taxes owing to the fact that both the contestant and the contestee in their pleadings, charged that a large number of persons were illegally permitted to vote who had not paid their poll taxes, the committee finds that the charges were sustained in only about a hundred cases. Where the evidence shows for whom the person voted deduction has been made from the vote of that particular candidate, and where there is no evidence how the party voted a deduction has been made pro rata, from the total vote of both candidates in the particular precinct.

The minority views, while concurring in a limited way in the findings of the majority, sustain the contention of the contestee, citing numerous authorities in support of that view and dissent from their decision rejecting such votes as follows:

Although in the inception of the case the contestant charged that 580 persons who had not paid their poll taxes voted for contestee, yet as the result of the evidence, in his reply brief, it is admitted that the total number of persons voting without payment of poll taxes in the city of Charlottesville and Albemarle and Clarke Counties amounted to 108, of whom 5 were shown to have voted for the contestant. The contestee, on the other hand, contends that the number of such persons who had not paid the requisite poll taxes was only 25, and in view of the rule that when a vote received without challenge at the ballot box is attacked in an election contest the contestant must remove the possibility that it was legal, and if he fails to do this it will be presumed that his failure to meet this essential requirement was due to his inability to do it, we agree with the contention of the contestee that the number of those who are shown not to have paid their poll taxes in the precincts complained of by the contestant does not exceed 25. Every reasonable intendment should be indulged in favor of the voter, and before a vote accepted by the judges of election can be thrown out it must be shown that it was illegal.

159. The case of Paul v. Harrison, continued.

In submitting evidence of illegal voting, parties to a contested election proceedings are confined to the names of alleged illegal voters set forth in the pleadings.

Instance wherein the report criticizes election laws of a State.

Where evidence shows for whom illegal votes were cast, deduction is made from the vote of that particular candidate; but where such evidence is lacking, deduction is made pro rata from the total vote of all candidates in that precinct.

Complete and reckless disregard for mandatory laws, involving the essentials of a valid election, requires rejection of entire returns of the precincts affected.

The minority also protest a preliminary ruling of the majority limiting the parties in their charges of illegal voting to names set forth in the pleadings.

On this question the minority say:

We cannot agree with the report of the committee that the parties to an election proceeding should be confined to the names of alleged illegal voters set forth in the pleadings. Such a view is not sustained by the decisions of the courts or the House of Representatives.

In 20 Corpus Juris, section 294, page 29, it is said:

“Where the ground of contest is the reception of illegal votes, the weight of authority is that, unless required by statute, it is not necessary to set out the names of the electors whose votes are alleged to have been improperly accepted or rejected; at least in the absence of a motion to make them more definite or specific * * *. And it seems settled in the House of Representatives

that it is not necessary in a notice of contest to give the names of illegal voters objected to or to furnish a list of them to the sitting Member.”

In 20 Corpus Juris, section 307, page 233, it is said that the same rule applies to the answer of the contestee.

A number of court decisions and reports in contested election cases are referred to in support of this doctrine, and the minority views claim:

In taking his evidence the contestant did not confine himself to the names set out in the exhibits to his notice, but in many instances introduced evidence of alleged illegal registrations in respect to other persons whose names were not on the exhibit, and persisted in doing so over the objection of the contestee, yet when contestee attempted to follow the precedent set by the contestant the contestant objected thereto. The majority of the committee in considering the alleged illegal votes on account of no applications or applications where assistance was claimed to have been given, have taken into consideration names not on the original exhibit attached to the notice; but in the view that we take of this case this is immaterial, for as above seen the authorities are to the effect that neither party is confined to the names set out in the pleadings.

(3) The minority considered at length a number of issues raised by the contestant but not discussed in the majority report.

As to the failure to provide voting booths:

While at some of the precincts in question there was a failure to have booths, yet the evidence will show that the requirements in respect to booths, or what substantially constituted booths, were at a large number of precincts substantially complied with, and at only a few of the precincts was there not a substantial compliance with these requirements, and in all the precincts the voter had the opportunity to cast and did cast a full, free, and secret ballot. The authorities hold that the failure to have booths will not vitiate an election where there was no showing that anyone was intimidated or prevented from casting or failed to cast a free ballot because of the lack of secrecy at the polls.

As to failure to keep the ballot box in view:

The majority of the committee in its report comments upon the keeping of the ballot box in view. What is meant by this is not explained. The contestant in his brief contended that section 27 of the Virginia constitution requiring the ballot box “to be kept in public view during the election”, means that it shall be kept in view of the public generally outside of the room in which the election is held. The contestee, however, took the position that it was sufficient if the ballot box be kept in view of the judges and clerks of election, and that it could not possibly have been intended that the law meant that the ballot box should be kept in the view of the public generally. Sections 161 and 167 of the Code of Virginia make it unlawful for persons other than election officials and the elector offering to vote to come within a certain distance of the polling place, and show that the construction contended for by the contestant cannot be correct. According to contestant’s contention an election held on the second floor of a building would not meet with the requirements of the statute as to the ballot box being within public view, and a room having only a door in front and not having windows through which the public could look into the room would be an improper place to hold an election.

However, we do not consider the objection well taken, as in *Suffolk Local Option case* (17 Va. Law Register, 353) the fact that the ballot box was not in public view was held not to vitiate the election. (See also *Augustin v. Eggleston*, 12 La. 366.)

As to assistance rendered voters by judges in the preparation of ballots:

There remains but one other reason advanced by the majority for the rejection of the returns at the precincts in question, and that is the claim that the judges of election openly and flagrantly assisted a voters who desired it in the preparation of their ballots without regard to the date of their registration or without regard to whether they were physically disabled.

The evidence in respect, to assistance to voters was of the vaguest and most general character. The character of the assistance was not shown, and how many persons were assisted does not appear. The testimony generally was to the effect that the judges of election would assist any persons who asked for assistance, but the number of persons who asked for assistance does not appear, and the contestant sought on such flimsy testimony to have rejected the vote at every precinct in respect to which this loose and general testimony was obtained. Certainly, in the absence of more effort on the part of the contestant to establish the number who were assisted, this objection should not be considered. The nature of the assistance, and the number of those assisted, were facts upon which there should be more evidence than there is in this record to warrant the rejection of the poll at any precinct. Especially is this true as at all the precincts a large per cent of the voters were entitled to assistance.

In summing up the case the majority comment upon the purpose and effect of the election laws of the State as follows:

No one can read the Virginia constitution of 1902 and the laws governing elections enacted in pursuance thereof without being convinced that its manifest purpose was to enable the dominant party to maintain its control of the State for all time through control of the election machinery. In justice to the people of the State of Virginia it ought to be stated that they were never given the opportunity to ratify the present constitution, that instrument having been proclaimed by the constitutional convention without submission to the electorate of the State.

Under this grossly unfair system the legislature elects the judges of the circuit court, all of whom are members of the dominant party, even in those circuits where a majority of the voters belong to the minority party. The decisions of these circuit judges in all election cases are final, there being no appeal to the appellate court, as in other States. These judges appoint, in each county and city, electoral boards of three members each, with no provision for minority representation, and these boards are almost invariably composed entirely of partisans of the dominant party. The electoral boards in turn choose the registrars, who are always members of the party in power, and also the judges and clerks of election. In the case of the latter the only provision for minority representation is the loosely drawn requirement that in the appointment of the judges of election representation "as far as possible" shall be given to each of the two major political parties, but in all cases the selection of the so-called minority member is exclusively in the hands of the electoral board, which, as mentioned above, is always in the control of the majority party.

The minority join issue on this view as follows:

The committee makes an attack upon the election laws of the State of Virginia. We understand that the precedents of the House of Representatives are to the effect that the mere fact that the election laws of a State do not conform to the ideas of what Congress considers to be model laws is no reason for unseating a person who has been elected as a Representative to Congress from such State.

The criticism by the majority of the committee of the constitution and laws of Virginia in respect to elections is of little relevancy in this case. The whole complaint resolves itself into the fact and to be based upon the ground that the majority of the people in the State of Virginia are Democrats and that consequently there is a Democratic legislature and Democratic judges are elected. There is not evidence to sustain or justify the contention that the judges in appointing members of the electoral board have been guilty of unfairness or made unwise selections, nor is there any evidence to the effect that the contestant ever requested that representation be given upon the electoral board in the county.

Rejecting the returns from precincts involved in their findings, the majority conclude that the contestant received a majority of the votes legally cast in the district, and recommend the following resolutions:

Resolved, That Thomas W. Harrison was not elected a Member of the House of Representatives from the seventh congressional district of the State of Virginia in this Congress and is not entitled to retain a seat herein.

Resolved, That John Paul was duly elected a Member of the House of Representatives from the seventh congressional district of the State of Virginia in this Congress and is entitled to a seat herein.

The minority contend that the findings of the majority are erroneous and that the official returns should not be disturbed, and recommend resolutions embodying statements to that effect.

The minority also dissent from the decision of the majority to reject the entire poll in certain precincts in which irregularities were found. The minority views contend:

In our opinion in order to warrant the rejection of the returns at any precinct it was incumbent upon the contestant to show facts which warranted the disenfranchisement of every voter at such precinct, or at least to make an effort to do so. In most of the precincts which were rejected only a relatively small portion of those registered were shown not to have complied with the constitutional requirements, and many of the voters necessarily need not have complied with such requirements.

From an examination of the facts and a consideration of the law we are of the opinion that the returns from the precincts rejected by the committee should not have been rejected and that the proper course to have been pursued would have been to apportion the illegal votes proved to have been cast. It is said in *McCreary on Elections* (sec. 523):

“The power to reject an entire poll is certainly a dangerous power, and though it belongs to whatever tribunal has jurisdiction to pass upon the merits of a contested-election case, it should be exercised only in an extreme case—that is to say, where it is impossible to establish with reasonable certainty the true vote.”

In *Paine on Elections* (secs. 497 and 498), quoted with approval in same case, it is said:

“Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officials should not be permitted to disenfranchise a district. * * * The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain the certainty of the result. A departure from the mode prescribed will not vitiate an election if the irregularities do not deprive any legal voter of his vote or admit an illegal vote or cast an uncertainty on the result, and have not been occasioned by the agency of a party seeking to derive a benefit from it.”

In the case of *Chadwick v. Melvin* (*Brightley's Election Cases* (Pa.), 251), it was held that there was nothing which will justify the striking out of an entire division but an inability to decipher the returns or the showing that not a single legal vote was polled, or that no election was legally held. Authorities might be multiplied to show that the action of the committee in rejecting the returns at precincts where many persons whose registration could not possibly have been complained of, and in respect to whom no complaint could be made on the score of assistance having been given, was erroneous. Certainly the votes of these persons should in any event have been counted, and the mere fact that the election officials were guilty of some technical irregularities should not destroy their votes, especially when, as in the case now under consideration, there is affirmative and uncontradicted evidence to the effect that the election was fairly and honestly conducted, and expressed the will of the voters, and there is no evidence to show that either the contestant was injured or the contestee benefited by the failure of the election officials to comply with all the constitutional and statutory requirements in respect to the conduct of the election. This is well established not only by the decisions of the House of Representatives. but also by the judicial decisions.

The ease was considered in the House on December 15.¹ After extended debate the previous question on the resolutions reported by the majority was ordered; yeas 203, nays 96.

On a division of the question, the first resolution declaring the sitting Member not elected was agreed to, yeas 202, nays 100. The second resolution, declaring the contestant elected and entitled to the seat, was then agreed to, yeas 201, nays 99.

Mr. Paul then came forward and took the oath.

¹Fourth session Sixty-seventh Congress, Record, p. 531.