

Note: Syllabi for O'Connor v Disney may be found herein at §35.10 (evidence necessary to compel examination of ballots); §37.20 (preservation of ballots); and §40.8 (burden of proving fraud sufficient to change election result).

§47. Seventy-third Congress, 1933-34

§47.1 Bowles v Dingell

On Feb. 9, 1934, Mr. John H. Kerr, of North Carolina, submitted the report⁽¹⁸⁾ of the Committee on Elections No. 3, in the election contest of Charles Bowles against John D. Dingell, from the 15th Congressional District of Michigan, in the 73d Congress. On May 12, 1933, the Speaker⁽¹⁹⁾ had laid before the House a letter⁽²⁰⁾ from the Clerk transmitting a "petition and accompanying letter" relating to the election of Nov. 8, 1932. The communication and accompanying papers were referred to the Committee on Elections No. 3 but not ordered printed.

The summary report related that "there was no notice of con-

18. H. Rept. No. 695, 78 CONG. REC. 2282, 2292, 73d Cong. 2d Sess.; H. Jour. 153.

19. Henry T. Rainey (Ill.).

20. 77 CONG. REC. 3344, 73d Cong. 1st Sess.; H. Jour. 255.

test ever filed in said matter, as provided by law," and dismissed the case. The report accompanied House Resolution 260,⁽²¹⁾ which Mr. Kerr offered from the floor as privileged on Feb. 24, 1934. The resolution was agreed to by the House by voice vote and without debate. It provided:

Resolved, That Charles Bowles is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Fifteenth Congressional District of the State of Michigan; and be it further

Resolved, That John D. Dingell is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Fifteenth Congressional District of the State of Michigan.

Note: Syllabi for Bowles v Dingell may be found herein at §20.1 (necessity for filing notice of contest).

§47.2 Brewster v Utterback

During the organization of the House of Representatives of the 73d Congress on Mar. 9, 1933, Mr. Bertrand H. Snell, of New York, objected to the oath being administered to the Member-elect, John G. Utterback, from the Third Congressional District of Maine. Mr. Utterback (contestee) was then asked by the Speaker,⁽²²⁾ under

21. 78 CONG. REC. 3165 73d Cong. 2d Sess.; H. Jour. 202.

22. Henry T. Rainey (Ill.).

the precedents, to stand aside while other Members-elect and Delegates-elect were sworn. Thereafter, Mr. Edward C. Moran, Jr., of Maine, offered from the floor as privileged House Resolution 5,⁽¹⁾ which stated:

Resolved, That the Speaker is hereby authorized and directed to administer the oath of office to the gentleman from Maine, Mr. John G. Utterback.

Resolved, That Ralph O. Brewster shall be entitled to contest the seat of John G. Utterback under the provisions of chapter 7, title 2, United States Code, notwithstanding the expiration of the time fixed for bringing such contests, provided that notice of said contest shall be filed within 60 days after the adoption of this resolution.

In response to the parliamentary inquiry propounded by Mr. Joseph W. Byrns, of Tennessee, the Speaker stated that under the general parliamentary law, the rules of the House not having been adopted, Mr. Moran was entitled to recognition for one hour on the resolution. Mr. Moran thereupon was granted unanimous-consent permission that time on the resolution be limited to 20 minutes, to be equally divided and controlled by himself and Mr. Snell, and that he be permitted to yield to Mr. Snell for the

1. 77 CONG. REC. 71, 73d Cong. 1st Sess.; H. Jour. 6.

purpose of offering a substitute to the resolution.

Mr. Moran related that the state canvassing board, consisting of the Governor and a seven-man council and responsible for certifying the election results, were divided four to four on the question of certification of contestee's election and that contestee (Mr. Utterback) did not possess a certificate signed by the Governor. Mr. Moran contended that the Third Congressional District of Maine was entitled to representation pending contestant's bringing of the contest as permitted by his resolution.

Mr. Snell then offered his substitute resolution⁽²⁾ which provided:

Resolved, That the papers in possession of the Clerk of the House in the case of the contested election from the third district of Maine, be referred to the Committee on Elections No. 1, with instructions to report on the earliest day practicable who of the contesting parties is entitled to be sworn in as sitting Member of the House.

Mr. Snell contended that the House should not recognize the prima facie right of contestee to a seat by permitting him to take the oath absent a certificate of election required by the House and by

2. 77 CONG. REC. 72, 73d Cong. 1st Sess.; H. Jour. 6.

the laws of Maine. Mr. John W. McCormack, of Massachusetts, cited several precedents wherein the House had permitted Members-elect to take the oath of office "when the House was satisfied that the man was elected." Mr. Snell claimed that the election was still in dispute. Upon his demand, the yeas and nays were ordered on his substitute, which was defeated by 105 yeas to 296 nays. The resolution seating Mr. Utterback was thereupon agreed to by voice vote, after which he appeared at the bar of the House and took the oath of office, confirming the seating of the contestee.

The report of the Committee on Elections No. 3 was submitted by Mr. Clark W. Thompson, of Texas, on May 22, 1934. Minority views of Mr. Randolph Perkins, of New Jersey, accompanied the report. (On Mar. 6, 1934, the Speaker had laid before the House a letter⁽³⁾ from the Clerk transmitting the contest, original testimony and other papers, and had referred it to the committee.)

The report related that in the "regular state election" held on Sept. 12, 1932, contestee (Utterback) had received 34,520 votes to 34,226 votes for contest-

ant and 213 votes for one Carl S. Godfrey, a plurality of 294 votes for contestee. Contestant alleged that in 16 of the voting precincts comprising the district, the fraudulent or negligent failure of election officials to perform their duties as required by state law was sufficient to void all votes cast in those precincts and therefore to establish a remaining plurality of votes for contestant. From the minority views of Mr. Perkins, it appears that contestant was claiming that election officials had neglected to provide voting booths in those precincts, that in other precincts ballots contained identical markings made by the same hand, that in another more ballots had been cast than there were voters, and that in yet another precinct officials had illegally permitted and assisted unqualified voters to cast ballots.

The committee report accepted as binding an advisory opinion of the Supreme Court of Maine rendered to the Governor and his executive council. That opinion advised that in two of the 16 contested precincts ballots should be discounted for failure of election officials to perform certain duties made mandatory by state law. The committee, assuming the validity of that opinion, found that contestee's plurality would then

3. 78 CONG. REC. 3874, 73d Cong. 2d Sess.; H. Jour. 237.

be reduced to 74. The committee then made the further assumption that “the advisory board did not think that there was sufficient evidence to disturb the returns from the other 14 precincts complained of by the contestant.” As to those 14 precincts, the committee determined “that there was not sufficient evidence of legal fraud or intentional corruptness to justify the committee to recount the ballots of those precincts or to justify the committee in sustaining the contestant’s contentions.”

Contestant evidently abandoned his allegations of fraud during the committee hearings, and relied upon proof of negligence and irregularities by officials to support his contest. On these grounds, the committee summarily sustained the court advisory opinion and refused to “disfranchise the voters in the 16 precincts . . . because of some alleged breach of official duty of the election officers.”

Mr. Perkins contended “that the provisions of voting booths as required by state law is a mandatory requirement and that in their absence the vote must be rejected” [citing *In re Opinions of the Justices*, 124 Me. 474, 126 A. 354 (1924)]. In one precinct where voting booths were not employed, he

cited as “undisputed” that 159 of 163 votes for contestee had been marked by a single election official. Citing *Yost v Tucker* (2 Hinds’ Precedents §1078), Mr. Perkins argued that the House should follow a state court interpretation that a particular state law is a mandatory requirement. Mr. Perkins further contended that there was much corroborative evidence in support of contestant’s particular allegations.

Mr. Thompson called up House Resolution 390⁽⁴⁾ as privileged on May 28, 1934. The resolution, which was agreed to by voice vote and without debate, provided:

Resolved, That Ralph O. Brewster is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Third Congressional District of the State of Maine; and further

Resolved, That John G. Utterback is entitled to a seat in the House of Representatives in the Seventy-third Congress from the Third Congressional District of the State of Maine.

Note: Syllabi for *Brewster v Utterback* may be found herein at §4.2 (House power over administration of oath to candidate in election contests); §5.14 (advisory opinions on state law); §9.2 (certificates of election); §10.13 (violations and errors by officials as

4. 78 CONG. REC. 9760, 73d Cong. 2d Sess.; H. Jour. 587.

grounds for contest); § 20.2 (notice of contest filed late); § 38.1 (voter intention as paramount concern in interpreting ballot).

§ 47.3 Casey v Turpin

Mr. John H. Kerr, of North Carolina, submitted the report⁽⁵⁾ of the Committee on Elections No. 3 on Mar. 12, 1934, in the election contest of John J. Casey against C. Murray Turpin from the 12th Congressional District of Pennsylvania. On Jan. 5, 1934, the Speaker⁽⁶⁾ had laid before the House a letter⁽⁷⁾ from the Clerk transmitting a copy of the notice of contest and reply with the statement that no testimony had been received within the time prescribed by law and that the contest apparently had abated. The Speaker had referred that communication to the Committee on Elections No. 3.

On Feb. 2, 1934, the Speaker laid before the House a letter⁽⁸⁾ from the Clerk transmitting a letter from contestant which stated that the commissioner before whom testimony had been taken

5. H. Rept. No. 930, 78 CONG. REC. 4359, 4360, 73d Cong. 2d Sess.; H. Jour. 252.

6. Henry T. Rainey (Ill.).

7. 78 CONG. REC. 137, 73d Cong. 2d Sess.; H. Jour. 28.

8. H. Doc. No. 237, 78 CONG. REC. 1854, 73d Cong. 2d Sess.; H. Jour. 123.

in his behalf "has failed to forward this testimony to the Clerk of the House of Representatives in accordance with law, and notwithstanding attempts to have her comply with the provisions of this statute, she has, up to the present date, failed to do so." Contestant requested the Clerk or the House to require the production of such testimony. The Clerk's communication, together with the contestant's request, was referred to the Committee on Elections No. 3 and ordered printed as a House document.

The committee report stated that "there was no evidence before the committee of the matters charged in his notice of contest, and no briefs filed, as provided by law." The committee dismissed the contest for lack of such evidence and for failure of contestant to appear in person to show cause why his contest should not be dismissed.

The committee report accompanied House Resolution 345,⁽⁹⁾ which Mr. Kerr called up as privileged on Apr. 20, 1934. Mr. Kerr immediately moved the previous question, and the resolution was agreed to by voice vote and without debate. House Resolution 345 provided:

Resolved, That John J. Casey is not entitled to a seat in the House of Rep-

9. 78 CONG. REC. 7082, 73d Cong. 2d Sess.; H. Jour. 424.

representatives of the Seventy-third Congress from the Twelfth Congressional District of the State of Pennsylvania.

Resolved, That C. Murray Turpin is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Twelfth Congressional District of the State of Pennsylvania.

Note: Syllabi for *Casey v Turpin* may be found herein at §15.1 (failure to take testimony within prescribed time); §29.1 (failure to produce testimony); §33.1 (cause for dismissal); §33.2 (order to appear).

§ 47.4 Chandler v Burnham

Mr. Joseph A. Gavagan, of New York, submitted the report⁽¹⁰⁾ of the Committee on Elections No. 2 on Apr. 19, 1934, in the election contest brought by Claude Chandler against George Burnham from the 20th Congressional District of California. The Speaker⁽¹¹⁾ had referred the contest to that committee on Jan. 16, 1934, on which date he had laid before the House a letter⁽¹²⁾ from the Clerk transmitting the contest, original testimony, and relevant papers.

In the election for Representative held Nov. 8, 1932, the official

returns gave a plurality of 518 votes to contestee from a total of 87,061 votes cast.

Contestant served timely notice of contest on Dec. 19, 1932, alleging that "he had received a majority of all the lawful votes cast"; that election officials had rejected "void, spoiled, mutilated, or marked" ballots cast for him; that there were deviations in the number of ballots delivered to and the number accounted for in some of the precincts; that many used ballots were unaccountably missing from the ballot boxes; and "that by reason of frauds, irregularities, and substantial errors, many votes counted for the contestee should have been counted for the contestant." The committee, while not dismissing the contest for failure of contestant to state with particularity the basis of his contest and the names and frauds alleged, stated that contestant's notice of contest had been insufficient in this respect and would under other circumstances be grounds for sustaining contestee's motion to dismiss.

In testimony and in his brief before the Committee on Elections No. 2, contestant alleged that in 14 precincts the combination of violations of election laws by officials through illegal counting, invalid compositions of election

10. H. Rept. No. 1278, 78 CONG. REC. 6971, 73d Cong. 2d Sess.; H. Jour. 419.

11. Henry T. Rainey (Ill.).

12. 78 CONG. REC. 760, 73d Cong. 2d Sess.; H. Jour. 64.

boards, unsworn officials, and unattested tally sheets and the condition of ballots and envelopes containing ballots should “warrant the rejection of the returns in total.”

The committee determined that contestant “failed to establish fraud, deceit, conspiracy, or connivance on the part of the contestee or any election board, official clerk, or employee.” In arriving at this determination, the committee was guided by the following postulates:

1. The official returns are prima facie evidence of the legality and correctness of official action.
2. That election officials are presumed to have legally performed their duties.
3. That the burden of coming forward with evidence to meet or resist these presumptions rests with the contestant.
4. That fraud is never presumed, but must be proven.
5. That the mere closeness of the result of an election raises no presumption of fraud, irregularities, or dishonesty.

The committee considered the distinction between “mandatory” election laws, which confer the right of suffrage by voiding an election unless certain procedures are followed, and “directory” statutes, which fix penalties for violation of procedural safeguards but do not void an election for non-

compliance. The committee determined that contestant had alleged violations of “directory” statutes, “a departure from which will not vitiate an election, if the irregularities do not deprive any legal voter of his vote, or admit an illegal vote, or cast uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive benefit from them.” The committee, while recognizing its power to reject entire groups of ballots as requested by contestant, stated that such power would only be exercised “where it is impossible to ascertain with reasonable certainty the true vote.”

Specifically, the committee rejected contestant’s claim that ballots in five precincts should be voided because election boards and precinct officials had not been sworn, finding that all such officials, other than inspectors, had subscribed to the required oath, and citing cases in support of the rule that an election will not be invalidated based on such failure, the acts of election officials acting under color of office being binding.

Contestant alleged “that by reason of a recount of approximately one third of the ballots cast” he had been elected. State law did not provide machinery for conducting a recount. Contestant

claimed that during the taking of testimony under subpoena, at which the ballots cast had been examined in the presence of both parties and their counsel, he had kept a tally of votes cast, including the very ballots he was declaring to be "marked, mutilated, or identified, and void, irregular, or otherwise improper ballots," and that this tally was sufficient to overcome contestee's plurality. As contestee had not known that contestant was conducting such tally, and was not given the opportunity to identify the ballots tallied, the committee ruled that "the testimony of the contestant in this respect is uncorroborated and constitutes a self-serving declaration wholly inadmissible in evidence and of no legal probative value." The committee therefore ruled out evidence concerning the tally, as well as the tally itself.

The report commented that contestant had made contradictory allegations on the one hand that an examination of the ballots as shown by his tally indicated that he had been elected, on the other hand "that the ballots were not preserved and returned in the manner required by law." The committee ruled that "these dual contentions cannot be maintained . . . they cannot be asserted legal for one purpose and illegal for another."

On May 15, 1934, Mr. Gavagan called up as privileged House Resolution 386⁽¹³⁾ which was agreed to by voice vote and without debate, and which provided:

Resolved, That George Burnham was elected a Representative in the Seventy-third Congress from the Twentieth Congressional District of California and is entitled to a seat as such Representative.

Note: Syllabi for Chandler v Burnham may be found herein at §5.11 (election committee's power to examine and recount disputed ballots); §10.10 (distinctions between mandatory and directory state laws); §10.14 (violations and errors by officials); §22.2 (failure to state grounds with particularity); §36.4 (official returns as presumptively correct); §36.11 (effective closeness of result); §37.21 (ballot tallies); §42.5 (resolution disposing of contest as privileged).

§ 47.5 In re Ellenbogen

On Mar. 11, 1933, the Speaker⁽¹⁴⁾ laid before the House a letter⁽¹⁵⁾ from the Clerk transmitting a memorial and accompanying papers filed by Harry E. Estep (a former Representative),

13. 78 CONG. REC. 8921, 73d Cong. 2d Sess.; H. Jour. 543.

14. Henry T. Rainey (Ill.).

15. 77 CONG. REC. 239, 73d Cong. 1st Sess., H. Jour. 66.

challenging the citizenship qualifications of Henry Ellenbogen, a Representative-elect from the 33d Congressional District of Pennsylvania. That communication and accompanying papers were referred to the Committee on Elections No. 2 (not ordered printed).

The signed report⁽¹⁶⁾ of the Committee on Elections No. 2, to accompany House Resolution 370, was submitted by Mr. Joseph A. Gavagan, of New York, on May 1, 1934. The report related the following undisputed facts:

1. That Mr. Ellenbogen (respondent), was born in Vienna, Austria on Apr. 3, 1900, declared his intention to become a United States citizen on May 19, 1921, and was admitted to citizenship on June 17, 1926;

2. That respondent was elected a Representative on Nov. 8, 1932, at that time being a citizen for six years, five months;

3. That upon commencement of the first session of the 73d Congress (convened by Presidential proclamation) on Mar. 9, 1933, respondent had been a citizen for six years, eight and one-half months and did not take the oath of office;

4. That upon commencement of the second session of the 73d Con-

gress on Jan. 3, 1934, respondent, then a citizen for seven and one-half years, took the oath of office;

5. That on Dec. 3, 1933, the date specified by article I, section 4, clause 2 of the Constitution for convening of the 73d Congress (which provision had not been superseded by the 20th amendment on the date of respondent's election) respondent would have been a citizen for seven years, five months.

Article I, section 2, clause 2 of the Constitution provides:

No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

The committee determined the central issue to be "as of what date is the seven year citizenship qualification for Representative provided for in section 2 above, to be determined?" Of particular interest was whether the Constitution requires seven years' citizenship prior to election, prior to the date on which the term commences, or prior to the time when the Member-elect is sworn. As the committee could not base its decision on an exact case in point, the committee resorted to "rules of constitutional and statutory construction, constitutional history,

16. H. Rept. No. 1431, 78 CONG. REC. 7873, 7876, 73d Cong. 2d Sess.; H. Jour. 479.

the rules of syntax, and prior interpretations of related but not identical sections of the Constitution.”

Employing first a syntax analysis, the committee determined that the words “when elected” in the second clause of section 2 modified the word “person” in the first clause only with respect to the subject of the second clause, i.e., habitancy, and that such words had no relation to the words “shall not have” and “been” in the first clause.

Examining next the history of section 2 at the Constitutional Convention and citing two preliminary drafts submitted at the convention, the committee concluded that “the intent of the framers (was) to require only habitancy ‘when elected’, the present section 2 leaving out ‘before the election’ from the citizenship [requirement] in the second draft.” The committee studied the reasons expressed in the debates at the convention for each of the three qualifications in section 2, concluding that the age and citizenship qualifications could only reasonably apply to Members (to assure maturity and loyalty), “hence dates of elections need not be controlling.”

Asserting that the age and citizenship requirements of section 2

were inserted with similar intent by the convention, the committee proceeded to cite precedents construing the age requirement for Representatives or Senators as demanding attainment of the required age when sworn and not when elected or at the commencement of term. The committee then construed section 2 itself as distinguishing between Representatives-elect in the second clause and Representatives who must in addition meet the qualifications of the first clause, and cited *Hammond v Herrick* (1 Hinds’ Precedents §499) for the proposition that election does not, of itself, constitute membership, “although the period may have arrived at which the congressional term commences.” As well, the committee reasoned that constitutional language requiring Congress to assemble the first Monday of December unless they by law appointed a different day indicated that the framers did not intend that age and citizenship requirements must be met at a fixed time.

The committee drew a further analogy from article I, section 6 of the Constitution, which prohibits a Member of Congress from “holding any office under the United States.” The report extensively cited *Hammond v Herrick*, in

which the House had construed that provision to require Members of Congress to divest themselves of incompatible offices before they are sworn, as foreseen dangers of executive control "could materialize only in a Member." The committee report in the *Hammond v Herrick* memorial matter stated:

. . . Neither do election and return create membership. These acts are nothing more than the designation of the individual, who, when called upon in the manner prescribed by law, shall be authorized to claim title to a seat. This designation, however, does not confer a perfect right; for a person may be selected by the people, destitute of certain qualifications, without which he cannot be admitted to a seat.

The Committee report concluded:

[A] plain reading of section 2 of the Constitution of the United States, the historical background of the section as exemplified by the debates in the Constitutional Convention, the objects sought to be accomplished by the requirements of the section, and the decisions of the committees of this House in analogous cases all compel an interpretation of the citizenship qualification of section 2 as to require 7 years of citizenship at the time when the person presents himself to take the oath of office.

On June 16, 1934 (legislative day of June 15), Mr. Gavagan called up House Resolution 370⁽¹⁷⁾

17. 78 CONG. REC. 12193, 73d Cong. 2d Sess.; H. Jour. 818.

as privileged. The resolution, which was agreed to by voice vote and without debate, declared:

Resolved, That when Henry Ellenbogen, on January 3, 1934, took the oath of office as a Representative from the Thirty-third Congressional District of the State of Pennsylvania, he was duly qualified to take such oath; and be it further

Resolved, That said Henry Ellenbogen was duly elected as a Representative from the Thirty-third District of Pennsylvania, and is entitled to retain his seat.

Note: Syllabi for *In re Ellenbogen* may be found herein at §6.5 (items transmitted by Clerk); §9.4 (citizenship); §17.3 (alternatives to statutory election contests).

§ 47.6 *Ellis v Thurston*

The report⁽¹⁸⁾ of the Committee on Elections No. 1 was submitted by Mr. Homer C. Parker, of Georgia, on Apr. 23, 1934, in the election contest brought by Lloyd Ellis against Lloyd Thurston from the Fifth Congressional District of Iowa. The contest had been referred to that committee on Feb. 19, 1934, on which date the Speaker⁽¹⁹⁾ had laid before the House a letter⁽²⁰⁾ from the Clerk

18. H. Rept. No. 1305, 78 CONG. REC. 7186, 7190, 73d Cong. 2d Sess.; H. Jour. 431.

19. Henry T. Rainey (Ill.).

20. 78 CONG. REC. 2769, 73d Cong. 2d Sess.; H. Jour. 178.

transmitting the contest, original testimony and accompanying papers. The Clerk's communication had been ordered printed (not designated as a House document).

The official returns gave contestee 51,909 votes to 51,732 votes for contestant, a majority of 177 votes for contestee. On Jan. 26, 1933, the parties to the contest agreed in writing to conduct a complete recount of votes, which showed contestant to have received 50,715 votes and contestee to have received 51,334 votes, a majority of 619 votes for contestee. The report stated that an additional 4,821 "disputed" votes "were not counted by the election judges for either contestant or contestee" and that 4,339 votes "were conceded to be no vote for either contestant or contestee."

Issues and findings of the 4,821 disputed ballots, contestant conceded that 1,575 ballots had been properly voided by election judges as not having been cast in conformity with state law, but contended that "the voters intended 1,000 of these ballots to be for Mr. Ellis and 575 for contestee, and should be included in the count." The committee report, assuming the validity of contestant's argument, found that contestee would retain a 194-vote majority.

The report then considered the remaining 3,246 disputed votes in

three categories. In his brief, contestant claimed that on 321 ballots which had been cast only for Presidential and Vice Presidential candidates, 250 had been cast for his party nominee and 71 for contestee's party nominee. Assuming that the parties should be respectively credited with such votes, the committee found contestee's majority to be 15 votes.

Again considering the figures given by contestant in his brief, the report cited 142 ballots marked for Presidential and Vice Presidential candidates of contestant's (Democratic) party and marked for candidates of the Republican party for other offices, but not marked for the office of Representative, as well as 13 ballots marked in contrary manner for the Presidential candidate of contestee's (Republican) party, with splits for certain Democratic candidates, but not marked for Representative. Finally, the report cited contestant's figures that of the remaining 2,770 disputed ballots, 2,164 had been marked for contestant's party candidate for President and Vice President and also marked for candidates of both parties for other offices, but not marked for Representative. By claiming all the ballots that were cast for the Presidential nominee

of his party, but which indicated no choice for Representative, and by claiming 1,000 of the 1,575 ballots found void under state law, contestant urged in his brief that he was entitled to the seat from the Fifth Congressional District of Iowa.

The report quoted the pertinent sections of Iowa law prescribing the manner of voting, and then concluded that "the figures given by the contestant in his brief do not warrant a decision in his favor." The committee ruled that voters in marking the squares opposite the Presidential and Vice Presidential candidates did not intend to vote a straight-party ticket, as the statute provided that a cross be placed in a separate party circle in order to cast such vote. The committee rejected contestant's claim that "the intent of the voter should be given effect regardless of local Iowa laws," holding rather that—

. . . [T]o presume now that the voters intended to vote otherwise than as expressed by their marked ballots would be to indulge in a presumption not justified in law or facts. We cannot assume that because voters voted for Roosevelt, or Hoover, who headed the respective tickets, that they intended to vote also for the candidates for Congress toward whom the voters indicated their neutrality.

Mr. Parker offered House Resolution 359⁽¹⁾ from the floor as

1. 78 CONG. REC. 7371, 73d Cong. 2d Sess.; H. Jour. 440, 441.

privileged on Apr. 25, 1934. The resolution, agreed to by voice vote and without debate, provided:

Resolved, That Lloyd Ellis was not elected a Representative in the Seventy-third Congress from the Fifth Congressional District of the State of Iowa, and is not entitled to a seat as such Representative.

Resolved, That Lloyd Thurston was elected a Representative in the Seventy-third Congress from the Fifth Congressional District of the State of Iowa, and is entitled to a seat as such Representative.

Note: Syllabi for *Ellis v Thurston* may be found herein at § 12.5 (balloting irregularities); §§ 37.6, 37.8 (interpretations of "straight ticket" votes).

§ 47.7 *Felix v Muldowney*

On Mar. 14, 1934, the Speaker⁽²⁾ laid before the House a letter⁽³⁾ from the Clerk transmitting the contest instituted by Anne E. Felix against Michael J. Muldowney from the 32d Congressional District of Pennsylvania. That communication, containing also original testimony and other accompanying papers, was referred to the Committee on Elections No. 2 and ordered printed.

The Committee on Elections No. 2 did not submit a report relating

2. Henry T. Rainey (Ill.).

3. 78 CONG. REC. 4508, 73d Cong. 2d Sess.; H. Jour. 259.

to this election contest during the 73d Congress, and the House took no other action with respect to the contest.

Note: Syllabi for *Felix v Muldowney* may be found herein at §43.13 (failure of committee to submit report on contest).

§ 47.8 *Fox v Higgins*

Mr. Randolph Perkins, of New Jersey, submitted the report⁽⁴⁾ of the Committee on Elections No. 3 on Mar. 10, 1934, in the election contest brought by William C. Fox against William L. Higgins from the Second Congressional District of Connecticut. The Speaker⁽⁵⁾ had referred the contest to that committee on Jan. 5, 1934, on which date the Clerk had transmitted to him the notice of contest, original testimony and accompanying papers relative to the contest. The Speaker had ordered the Clerk's communication⁽⁶⁾ printed (not designated as a House document).

In 56 of the 62 towns or voting districts comprising the Second Congressional District of Connecticut the "Australian ballot,"

4. H. Rept. No. 894, 78 CONG. REC. 4185, 4223, 73d Cong. 2d Sess.; H. Jour. 247.

5. Henry T. Rainey (Ill.).

6. 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

by which voters could vote a "straight ticket" by marking an "X" in the circle above a party column, was employed as the official ballot. State law voided ballots marked with an "X" in more than one party circle. The report stated that the committee had no evidence as to the total number of ballots rejected for this reason in the 56 towns or elections districts, but that contestant had introduced evidence that in 28 of those districts 624 ballots were rejected for duplicity of voting.

Contestant's witnesses (election officers) testified that the term "Wet Party" appeared adjacent to the column designated as "Repeal, eighteenth amendment, Yes and No" on these ballots; that 447 of them had been marked both in contestant's "straight ticket" Democratic circle and in the "Wet Party" circle; and that 147 had been marked in contestee's "straight ticket" Republican circle and in the "Wet Party" circle. Contestant requested the committee to credit him with the 300-vote differential, which, when taken from contestee's official plurality of 221 votes, would establish contestant as having been elected by 79 votes.

Contestant contended that "by reason of the juxtaposition of the 'Wet Party' column and the 'repeal

of the eighteenth-amendment' column, voters were confused and voted their straight-party affiliations and then, through confusion, intending to vote for repeal, voted in the 'Wet Party' circle, and thus vitiated their ballots." Contestant also alleged that contestee, in his capacity as secretary of state, had intentionally caused such confusion by preparing the ballots, and that contestee had induced one Michael H. Rollo to become a candidate for Congress with the party platform and designation of "Wet Party" so as to confuse the electors and vitiate their "Straight-ticket" votes.

The committee found no evidence to justify it in reporting that the official count of the votes was incorrect. The committee also stated that contestant had produced no evidence that Mr. Rollo's candidacy was in any way procured or induced by the contestee or by anyone in his behalf. Mr. Rollo, called as a witness before the committee by contestant, testified that his candidacy had not been solicited by contestee.

The committee found that though "it is not improbable that some voters were confused," the evidence showed that the ballots had been prepared according to law by a deputy secretary of state

who had placed the "Wet Party" last on the ticket in the Second District because it was only being voted on in that district and not statewide. The evidence also showed that the parties to be voted on statewide were listed first, followed by the names of the local parties on certain ballots that were printed separately. The committee found that contestee, as secretary of state, had not "designedly caused the ballots to be printed in order to create confusion, or for the purpose of obtaining an advantage as a candidate. . . ."

The committee found, consistent with contestant's admission, that "the ballots which were rejected should have been rejected" under state law prohibiting voting for more than one "straight ticket." Five witnesses testified that they had intended to vote their regular party affiliation and, for repeal, and had mistakenly voted for the "Wet Party." The report stated that "this was not the case of an ambiguous or doubtful ballot, where the committee can look at the circumstances surrounding the election explaining the ballot, and get at the intent and real act of the voter." Rather, as the ballots had been marked for Mr. Rollo as well as for other candidates, the committee could not

determine whether voters had intended to vote for Mr. Rollo and otherwise for a straight Republican or Democratic ticket, or to cast a straight vote for contestant's (Democratic) ticket or contestee's (Republican) ticket and for repeal of the 18th amendment. The committee found the question of intention of the voters of the rejected ballots to be a matter of conjecture, and the evidence before the committee in this respect to be "wholly unreliable."

The committee report accompanied House Resolution 296,⁽⁷⁾ which was called up as privileged by Mr. Clark W. Thompson, of Texas, on May 28, 1934. The resolution, which was agreed to by voice vote and without debate, provided:

Resolved, That William C. Fox is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Second Congressional District of the State of Connecticut.

Resolved, That William L. Higgins is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Second Congressional District of the State of Connecticut.

Note: Syllabi for *Fox v Higgins* may be found herein at §11.1 (confusing the voters as grounds for contest); §12.6 (balloting irregularities); §37.1 (ambiguous bal-

7. 78 CONG. REC. 9760, 73d Cong. 2d Sess.; H. Jour. 587.

lots); and §38.3 (voter intention as paramount concern in interpreting ballot).

§ 47.9 Gormley v Goss

On Mar. 13, 1934, Mr. Joseph A. Gavagan, of New York, submitted the report⁽⁸⁾ of the Committee on Elections in the election contest brought by Martin E. Gormley against Edward W. Goss from the Fifth Congressional District of Connecticut. The Speaker⁽⁹⁾ had referred the contest to that committee on May 9, 1933, on which date the Clerk had transmitted to him the notice of contest, original testimony, papers, and documents relative to the contest. The Speaker had ordered the Clerk's communication printed.⁽¹⁰⁾

According to the official returns of the election held Nov. 8, 1932, contestee received 42,132 votes to 42,054 votes for contestant—a majority of 78 votes for contestee.

Contestant alleged that through "fraud, irregularities, corruption, and deceit" on the part of contestee's agents at voting booth No. 1 in the third voting precinct

8. H. Rept. No. 893, 78 CONG. REC. 4035, 73d Cong. 2d Sess.; H. Jour. 244.

9. Henry T. Rainey (Ill.).

10. 77 CONG. REC. 3085, 73d Cong. 1st Sess.; H. Jour. 245, 246.

in the city of Waterbury, he was “deprived of many votes far in excess of the number of votes necessary to overcome contestee’s majority.”

Contestee requested dismissal of the allegations raised in the notice of contest on the ground that they were “vague and uncertain and were lacking in necessary particulars” as required by statutes (2 USC §201). The committee heard argument as to the sufficiency of the notice of contest, and agreed that contestant’s notice of contest did not meet the requirements of the statute.

The committee considered the evidence in the case following the “postulates” that:

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

2. That election officials are presumed to have performed their duties loyally and honestly.

3. The burden of coming forward with evidence to meet or resist these presumptions rests with the contestant.

Witnesses who had voted in the precinct in question testified that the moderator of the voting district, Thomas Summa, “on occasions was seen to stick his head into the voting booth and on some occasions to enter the said booth’.”

Considering all the testimony relating to booth No. 1 in the

third voting precinct, the committee found that “confusion existed” with regard to voting on the question of “the repeal or maintenance of the eighteenth amendment,” and as to this question’s placement on the voting machine. The committee further found that many voters were seeking information in this respect and “were given assistance and attention”; and that there were no complaints made to the nonpartisan election board as to “irregularity, interference, or fraud.” Of all witnesses called, none testified that any of the votes cast were fraudulently obtained by the contestee, and further that the intent of the voter was not vitiated by any interference with the keys on the voting machine.

Contestant alleged that Mr. Summa conspired with contestee to influence voters in the booth by putting his head inside the curtain, speaking to the voters, or entering the booth. This thesis the committee rejected on the basis that they would have to ignore the fact that “the polling place in question was in charge of a bipartisan election board” and arbitrarily assume “that the Democratic members thereof were either deaf, dumb, and blind, or willfully corrupt conspirators.” Deciding that such conclusion “would

be arbitrary, unjust, and unworthy of a judicial body," the committee concluded instead that:

. . . [T]he contestant has failed to establish the allegations contained in the notice of contest, has failed by a fair preponderance of the evidence to establish any fraud, deceit, or conspiracy on the part of the contestee and the election official or officials engaged in the election in question.

The committee report accompanied House Resolution 346,⁽¹¹⁾ which was called up as privileged by Mr. Gavagan on Apr. 20, 1934. The resolution, which was agreed to by voice vote and without debate, provided:

Resolved, That Edward W. Goss was elected a Representative in the Seventy-third Congress from the Fifth Congressional District in the State of Connecticut and is entitled to a seat as such Representative.

Note: Syllabi for *Gormley v Goss* may be found herein at §12.1 (voter confusion as excuse for official's entering booth); §22.1 (failure to state grounds with particularity); §36.5 (official returns as presumptively correct); §42.2 (resolution disposing of contest as privileged).

§ 47.10 LaGuardia v Lanzetta

On Jan. 5, 1934, the Speaker⁽¹²⁾ laid before the House a letter⁽¹³⁾

11. 78 CONG. REC. 7087, 73d Cong. 2d Sess.; H. Jour. 424.

12. Henry T. Rainey (Ill.).

13. 78 CONG. REC. 136, 137, 73d Cong. 2d Sess.; H. Jour. 28.

from the Clerk transmitting his unofficial knowledge of the institution of an election contest by Fiorello H. LaGuardia against James J. Lanzetta from the 20th Congressional District of New York. It related that a copy of notice of contest and reply thereto had been filed with the Clerk, but that, since no testimony had been transmitted within the time prescribed by law, the contest had apparently abated. The Clerk's communication and accompanying papers were referred to the Committee on Elections No. 1 and ordered printed.

The Committee on Elections No. 1 did not submit a report relating to this election contest during the 73d Congress, and the House took no action to dispose of the contest.

Note: Syllabi for *LaGuardia v Lanzetta* may be found herein at §15.2 (failure to take testimony within prescribed time).

§ 47.11 Lovette v Reece

On Apr. 23, 1934, Mr. Clarence E. Hancock, of New York, submitted the report⁽¹⁴⁾ of the Committee on Elections No. 1 in the election contest of O. B. Lovette against B. Carroll Reece from the First Congressional District of

14. H. Rept. No. 1306, 78 CONG. REC. 7186, 7190, 73d Cong. 2d Sess.; H. Jour. 431.

Tennessee. The contest had been referred to that committee on Jan. 5, 1934, on which date the Speaker⁽¹⁵⁾ had laid before the House a letter⁽¹⁶⁾ from the Clerk transmitting the notice of contest and original testimony. The Speaker had ordered the Clerk's communication printed with accompanying papers.

The report stated that in the general election held on Nov. 8, 1932, of six candidates for Representative from the First Congressional District of Tennessee, contestee had received 30,366 votes to 27,888 votes for contestant, with 7,950 votes for one Tipton and a few hundred other votes for the three remaining candidates, leaving a plurality of 2,478 votes for contestee over contestant. Contestant filed timely notice of contest on Dec. 17, 1932, to which contestee filed timely answer and motion to dismiss on Jan. 15, 1933. Then, in April of 1933, contestant filed an amended and supplemental notice of contest.

The committee first found that contestant (Mr. Lovette) had not sustained the grounds of contest set forth in the original notice, which alleged fraudulent uses of

money to influence the election, and which allegations were based on hearsay testimony. Specifically the committee found that the alleged instances of fraud and irregularities were more probably connected with simultaneous elections for Governor and for President, and that contestee (Mr. Reece) had not participated in such practices and had not benefited therefrom more than had contestant.

With respect to the amended and supplemental notice, though filed after the time prescribed by law for the filing of notice of contest, the committee granted contestant's request that testimony of certain witnesses, taken pursuant to such notice and after expiration of the prescribed time period, be printed.

The committee found that, as to the allegations that contestee's brother had collected large sums of money to finance contestee's election, the evidence indicated that those efforts had been concentrated upon securing a nominee for Governor and involved transactions occurring after the election not connected with contestee. Accordingly, the committee concluded that "the evidence adduced by contestant fails utterly to support the charges in the original notice of contest and

15. Henry T. Rainey (Ill.).

16. 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

in the amended and supplemental notice, and that what little evidence there is which might tend to support some of the allegations is so vague and inconclusive as to cast no doubt on the right of contestee to retain his seat.”

The report recommended the adoption of House Resolution 358,⁽¹⁷⁾ which Mr. Homer C. Parker, of Georgia, offered from the floor as privileged on Apr. 25, 1934. The resolution, which was agreed to without debate and by voice vote, provided:

Resolved, That O. B. Lovette was not elected a Representative to the Seventy-third Congress from the First Congressional District of the State of Tennessee, and is not entitled to a seat therein.

Resolved, That B. Carroll Reece was duly elected a Representative to the Seventy-third Congress from the First Congressional District of the State of Tennessee, and is entitled to retain his seat therein.

Note: Syllabi for *Lovette v Reece* may be found herein at § 10.20 (illegal use of funds); § 20.3 (notice of contest filed late); § 35.9 (allegations of improper expenditures).

§ 47.12 McAndrews v Britten

Mr. Homer C. Parker, of Georgia, submitted the report⁽¹⁸⁾ from

17. 78 CONG. REC. 7371, 73d Cong. 2d Sess.; H. Jour. 440.

18. H. Rept. No. 1298, 78 CONG. REC. 7166, 7190, 73d Cong. 2d Sess.; H. Jour. 431.

the Committee on Elections No. 1 on Apr. 23, 1934, in the election contest of James McAndrews against Fred A. Britten from the Ninth Congressional District of Illinois. The contest had been referred to that committee on Jan. 5, 1934, on which date the Speaker⁽¹⁹⁾ had laid before the House a letter⁽²⁰⁾ from the Clerk transmitting the notice of contest, testimony and other papers.

The report stated that contestee had received 40,253 votes from the official returns of the election held Nov. 8, 1932, and that contestant had received 36,596 votes in that election, a plurality of 3,657 votes for contestee.

In his notice of contest, contestant alleged that contestee had violated the Federal Corrupt Practices Act and that contestee had received a “split-vote” so disproportionately large as compared to the “straight votes” cast for him “that the presumption of fraud naturally and necessarily follows.” The committee report rejected all such allegations as not supported by the evidence, stating that “the testimony of a so-called ‘expert’ upon the disproportionate split vote is so frail and unconvincing in its nature as to leave no doubt

19. Henry T. Rainey (Ill.).

20. 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

in the mind of the committee of the falsity of the charge of fraud by reason of said disproportionate split vote.”

The contestant's allegations and the committee's grounds for their rejection were more specifically elaborated in debate on the floor of the House on Apr. 26, 1934. On that date, Mr. Parker offered House Resolution 362⁽¹⁾ from the floor as privileged. Mr. Parker had, on Apr. 25, 1934, offered that resolution⁽²⁾ for the immediate consideration of the House. When a Member had sought time to debate the resolution, Mr. Parker withdrew the resolution and sought unanimous consent that it be considered the following day after disposition of business on the Speaker's table. The Speaker informed Mr. Parker that such request was not necessary, as the resolution was privileged and could be called up at any time.

On Apr. 26, immediately upon the offering of the resolution by Mr. Parker, Mr. Adolph J. Sabath, of Illinois, sought recognition to offer a “substitute” for the resolution. Mr. Parker refused to yield for that purpose and was recognized by the Speaker pro tem-

1. 78 CONG. REC. 7456, 73d Cong. 2d Sess.; H. Jour. 448.

2. 78 CONG. REC. 7371, 73d Cong. 2d Sess.

pore⁽³⁾ for one hour. Mr. Sabath thereupon asked unanimous consent that his “substitute” be read for the information of the House, to which request Mr. Ralph R. Eltse, of California, objected. Mr. Parker then yielded 30 minutes for debate to Mr. John B. Hollister, of Ohio, and 15 minutes to Mr. Sabath. Mr. Sabath read the substitute which he had attempted to offer:

Whereas Committee on Elections No. 1, on March 15, 1934, ordered a recount of the votes cast in the election held November 8, 1932, in the Ninth Congressional District in the State of Illinois; and

Whereas a subcommittee was authorized to recount the ballots and to obtain a determination of the actual votes cast for contestant and contestee; and

Whereas notwithstanding said action of said committee, and without said recount having been made, the committee reported on April 23 to the House recommending the adoption of a resolution entitling contestee to retain his seat; and

Whereas the action of the committee was taken without notice to the contestant, and thereby nullified its own previous action without due procedure or formality of notice to contestant: Therefore be it

Resolved, That the Committee on Elections No. 1, or a subcommittee thereof, is hereby authorized to recount the ballots cast in said election and to

3. Claude V. Parsons (Ill.).

report to the House the number of votes received by the contestant and the number of votes received by the contestee.

Mr. Sabath also stated that Mr. Parker had, on Apr. 16, 1934, introduced House Resolution 335 which was referred to the Committee on Accounts and which provided that "\$2,500 be appropriated for the purpose of defraying the expense of recounting the ballots in the city of Chicago." No action was taken on that resolution.

In response to Mr. Sabath's criticism of these committee actions, Mr. Parker stated that the Committee on Elections No. 1 had voted to conduct a recount on Mar. 15, 1934, "because it believed that neither party to the contest objected to the ballots being counted," and that upon a rehearing in which contestee's objections to such procedure were presented, the committee had voted unanimously to reconsider the ordering of the recount. Mr. Lindsay C. Warren, of North Carolina, defended the action of the Committee on Accounts in not reporting the expense resolution, as no reason had been given that committee to justify a recount and as the Committee on Elections had unanimously reconsidered and decided against such recount.

With respect to alleged violations of the Corrupt Practices Act,

contestant had claimed, and contestee acknowledged on the floor of the House during debate on the resolution, that contestee had "offered prizes to the various precinct captains whose precincts voted the largest votes in proportion to the Republican votes that were given in these precincts." Mr. David D. Terry, of Arkansas, defended the committee finding that this offering of prizes was not a violation of 2 USC §150 which provided:

It is unlawful for any person to make or offer to make an expenditure or to cause an expenditure to be made or offered to any person either to vote or withhold his vote or to vote for or against any candidate, and it is unlawful for any person to solicit, accept, or receive any such expenditure in consideration of his vote or the withholding of his vote.

Mr. Parker contended that the large split vote for contestee had been the case for many members of contestee's political party, as they had to have "run ahead of the ticket" to have been elected on Nov. 8, 1932, as a candidate of that party.

After Mr. Parker moved the previous question, which was ordered by voice vote, the resolution was agreed to by voice vote. It provided:

Resolved, That James McAndrews was not elected a Representative to the

Seventy-third Congress from the Ninth District of the State of Illinois and is not entitled to a seat therein.

Resolved, That Fred A. Britten was duly elected a Representative to the Seventy-third Congress from the Ninth Congressional District of the State of Illinois and is entitled to retain his seat.

Note: Syllabi for *McAndrews v Britten* may be found herein at § 11.4 (“prizes” to campaign workers); § 12.4 (balloting irregularities); § 41.6 (reconsideration of action of ordering a recount); § 42.3 (resolution disposing of contest as privileged); § 42.17 (substitute resolutions).

§ 47.13 *Reese v Ellzey*

On Feb. 9, 1934, Mr. John H. Kerr, of North Carolina, submitted the report⁽⁴⁾ of the Committee on Elections No. 3 in the election contest of *Reese v Ellzey* from the Seventh Congressional District of Mississippi. The contest had been referred to that committee on Jan. 5, 1934, on which date the Speaker⁽⁵⁾ had laid before the House a letter⁽⁶⁾ from the Clerk transmitting his “unofficial knowledge” of the contest together

4. H. Rept. No. 696, 78 CONG. REC. 2282, 2292, 73d Cong. 2d Sess.; H. Jour. 153.

5. Henry T. Rainey (Ill.).

6. 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

with contestant’s letter of withdrawal therefrom. Upon referral, the Clerk’s letter and accompanying papers had been ordered printed.

The committee report contained contestant’s letter of withdrawal from the contest. Contestant claimed that the election of Nov. 8, 1932, was void “when two so-called ‘Republican’ tickets were placed on the ballot in this district,” that “in the failure to appoint a single Republican election officer or judge in the entire district as mandated by the laws of the State of Mississippi, there was also a direct and willful violation of the law” and that “my party and myself have been illegally discriminated against.” Nevertheless, “while so many matters of vital importance require the attention of the Congress, it would be unpatriotic on my part to attempt to occupy the time of Congress about a matter of such trivial importance to the welfare of our country.” The committee report accompanied House Resolution 261,⁽⁷⁾ Mr. Kerr offered from the floor as privileged on Feb. 24, 1934. The resolution was agreed to by voice vote and without debate after Mr. John E. Rankin of Mississippi, observed that the resolution incor-

7. 78 CONG. REC. 3165, 73d Cong. 2d Sess.; H. Jour. 202.

rectly referred to the Eighth Congressional District, rather than to the Seventh Congressional District of the State of Mississippi. Mr. Kerr obtained unanimous-consent permission that the resolution be corrected accordingly. As thus amended, the resolution—

Resolved, That L. G. Reese is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Seventh Congressional District of the State of Mississippi; and be it further

Resolved, That Russell Ellzey is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Seventh Congressional District of the State of Mississippi.

Note: Syllabi for Reese v Ellzey may be found herein at §6.10 (items transmitted by Clerk); §43.12 (effect of contestant's withdrawal or abandonment of contest).

§47.14 Kemp, Sanders Investigation

On June 19, 1933, three days after the adjournment of the first session of the 73d Congress, the death of Mr. Bolivar E. Kemp created a vacancy in the seat from the Sixth Congressional District of Louisiana.

On Jan. 3, 1934, the date of the convening of the second session of the 73d Congress, the Speaker⁽⁸⁾

8. Henry T. Rainey (Ill.).

laid before the House a letter⁽⁹⁾ from the Clerk transmitting a certificate of election of Mrs. Bolivar E. Kemp, Sr., signed by the Governor of Louisiana and attested by the Secretary of State of Louisiana, to fill the vacancy. The Clerk's letter also transmitted a certificate of election of J. Y. Sanders, prepared by the "Citizens' Election Committee of the Sixth Congressional District," to fill said vacancy. Thereupon, Mr. Riley J. Wilson, of Louisiana, offered from the floor House Resolution 202:⁽¹⁰⁾

Resolved, That the question of prima facie as well as the final right of Mrs. Bolivar E. Kemp, Sr., and J. Y. Sanders, Jr., contestants, respectively, claiming a seat in this House from the Sixth District of Louisiana, be referred to the Committee on Elections No. 3; and until such committee shall have reported in the premises and the House decided such question neither of said contestants shall be admitted to a seat.

Mr. Wilson, recognized for one hour on his resolution, expressed the acquiescence of the Louisiana delegation and of the contestants in its adoption. The resolution was agreed to by voice vote.

On Jan. 20, 1934,⁽¹¹⁾ Mr. John H. Kerr, of North Carolina, sub-

9. 78 CONG. REC. 11, 12, 73d Cong. 2d Sess.; H. Jour. 13, 14.

10. 78 CONG. REC. 12, 73d Cong. 2d Sess.; H. Jour. 14.

11. H. Rept. No. 334, 78 CONG. REC. 1035, 73d Cong. 2d Sess.; H. Jour. 80.

mitted the unanimous report of the Committee on Elections No. 3 to accompany House Resolution 231.⁽¹²⁾ The committee found no dispute concerning the facts involving the election held on Dec. 5, 1933, at which Mrs. Kemp received about 5,000 votes (a few votes having been cast for other parties), and involving the election held on Dec. 27, 1933, at which Mr. Sanders received about 15,000 votes (a few votes having been cast for other parties).

The report relates as undisputed fact that from the time of the death of Bolivar E. Kemp on June 19, 1933, until Nov. 27, 1933, the Governor of Louisiana did not issue a writ of election to fill the vacancy, though he was "petitioned by thousands of voters of the Sixth Congressional District to issue his proclamation. . . ." According to the report, "On the 27th day of November 1933, there was delivered to the district committee in the city of New Orleans outside the Sixth Congressional District a proclamation calling for an election to be held within eight days, namely, on the fifth day of December 1933." In his statement made in debate on Jan. 29, 1934, however, Mr. Kerr related that

12. See 78 CONG. REC. 1521, 73d Cong. 2d Sess., Jan. 29, 1934, where resolution was adopted.

the proclamation of the Governor had been "entrusted to the executive committee of the Sixth District, and that committee, outside the district, in the city of New Orleans, called an election pursuant to this proclamation of the Governor, or at least announced that there would be an election, and undertook to name a candidate to be voted on at that election."

On Nov. 28, 1933, the Citizens' Election Committee of the Sixth Congressional District met in the district and fixed the day for the "election" at Dec. 27, 1933, 30 days after the meeting.

The report then undertook to recite and interpret federal and state law governing the holding of elections to fill vacancies. The report cited provisions of the U.S. Constitution permitting the states to prescribe the time, place, and manner of holding elections for Representatives, subject to alteration by Congress (art. I, § 4), and providing that the state executive authority "shall issue writs of election" to fill vacancies in the House of Representatives (art. I, § 2). Citing *Ex parte Clarke* (1879), 100 U.S. 399, the committee affirmed the power of Congress to adopt the laws of the states regulating methods of electing Representatives.

The report recited portions of the laws of Louisiana (the general

election law, Act 130, A.D. 1916, and the primary law, Act 97, A.D. 1922) relevant to the choosing of candidates for filling vacancies and to the filling of such vacancies:

That it shall be the duty of the Governor, at least thirty days before every general election, to issue his proclamation, giving notice thereof, which shall be published in the official journal.

In case of a vacancy in the said office of Representative in Congress, between the general elections, it shall be the duty of the Governor by proclamation to cause an election to be held *according to law* to fill such vacancy. (Emphasis added.)

From this, the committee concluded that "the proclamation of the Governor, who is required by law to call either a general or special election, carries with it the duty to give the electorate a reasonable notice of the time, place, and manner of such election, and the failure to give said notice is a contravention of both the spirit and the letter of the law."

The report then cited section 9 of the primary election law which provided:

That whenever a special election is held to fill a vacancy for an unexpired term caused by death, resignation or otherwise of any officer, the respective committees having authority to call primary elections to nominate candidates for said office, shall have full authority to fix the date at which a

primary election shall be held to nominate candidates in said special election, which date shall not be less than *ten days after the special election shall have been ordered.*

The committee concluded that "it is mandatory that the Governor should give more than 10 days' notice of said election in order that the district committee might comply with the law and allow the electorate of the district to select a candidate," i.e., "to call a primary 'within not less than 10 days after the special election has been called'."

Section 1 of the primary law provided:

That all political parties shall make all nominations for candidates for the United States Senate, Members of the House of Representatives in the Congress . . . *by direct primary elections.* That any nomination, of any person for any of the aforesaid mentioned offices by any other method *shall be illegal*, and the secretary of state is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of this act.

The report stated that "in this state a nomination in a Democratic primary assures the candidate of election, at either a special or general election; and this makes the primary most important." Thus the primary election was, in effect, the sole method of selecting candidates.

Section 31 of the primary laws provided three exceptions to the requirement of direct primary elections:

That all vacancies caused by death or resignation or otherwise among the nominees selected by any political party, under the provisions of this act, shall be filled by the committee, which has jurisdiction over the calling and ordering of the said primary election, and in the event that no person shall have applied to become a candidate for a political office within the time fixed by law, or the call of the committee ordering the primary, or in any other event wherein the party shall have no nominee selected under the provisions of this act, the committee calling the primary shall select the nominee for any position named in the call of the committee and shall have full authority to certify said name as the nominee of the said party: . . .

The report found that the district committee, without "calling" a primary election, "undertook and did name Mrs. Kemp as the candidate to be voted for at the December 5 election, called by the Governor" and that "this procedure of the district committee could not come within the exceptions defined in section 31 of the primary law." During debate in the House on Jan. 29, 1934, Mr. Kerr attempted to clarify the intent of section 31 as permitting a committee to supply nominees where none or only one had applied in response to the primary

call, "so that the people could have the opportunity of selecting their candidate." Mr. Cox raised the question whether if the election were called at a time that made impossible the holding of a primary election, the committee might then make the nomination itself. Mr. Kerr replied that "the committee had no right under the law to participate in any kind of action which deprived the people of the state of Louisiana of nominating a candidate." Mr. Cleveland Dear, of Louisiana, interpreted the language "or in any other event wherein the party shall have no nominee selected under the provisions of this act" as not permitting the executive committee to make a nomination where there has been no primary election unless such primary had been called. Citing the section 31 language "the committee calling the election," Mr. Dear contended that the committee must call a primary election as a condition precedent to its powers of nomination, as "there must be a time fixed for them (candidates) to qualify. . . . Under this section the committee calling and ordering the primary has authority to select the nominee for any position named in the call of the committee clearly indicated that there must be first a call before it is au-

thorized to name such a nominee." The report concluded that "both the nomination and election of Mrs. Kemp are illegal and void; that the Governor's proclamation was not in accordance with the law; and the voters of the district were not allowed to choose a candidate in the method approved by law, and therefore, Mrs. Kemp is not entitled to a seat in the House of Representatives."

On Jan. 22, 1934, Mr. Ross A. Collins, of Mississippi, took the floor⁽¹³⁾ to dissent from the committee report which had been submitted Jan. 20. He contended that Mrs. Kemp should have been granted prima facie right to a seat, her credentials being regular in form and there being no question as to her constitutional and personal qualifications. To this Mr. Charles L. Gifford, of Massachusetts, replied that the House had on Jan. 3, 1934, determined that such question be referred to the Committee on Elections for report. During debate on Jan. 29, 1934, Mr. Randolph Perkins, of New Jersey, claimed that "there could be no prima facie right unless there were a legal election. A mere certificate would not establish prima facie right; there would have to be underlying that certificate a legal election."

Mr. Collins cited McCrary on Elections (George McCrary, A

Treatise on the American Law of Elections, Chicago, Callaghan & Co., 1897), paragraphs 185 and 186, in support of his contention that the Governor may fix the time for a special election to fill a vacancy where the legislature has not established such time, and where the existence of five candidates, none of whom might achieve a majority in the first primary, would under state primary law force subsequent primaries beyond Jan. 1, 1934, at which time state law would void the existing registrations of voters and require new registrations. Mr. Collins also supported the nomination of Mrs. Kemp by the committee, absent the calling of a primary, claiming that the words "calling the primary" in section 31 were "merely descriptive of the committee whose duty it is to make the nomination. Were it not for this descriptive language, some other congressional committee might claim the right to make the nominations."

With respect to the election of Mr. Sanders on Dec. 27, 1933, as called by the "Citizens Election Committee," the view was taken that such election was illegal and void, there being no political machinery under the laws of Louisiana providing therefor.

On Jan. 20, 1934, Mr. Kerr called up House Resolution 231 as

13. 78 CONG. REC. 1109-11, 73d Cong. 2d Sess.

privileged, and obtained unanimous consent permission that time for debate be extended to one and one-half hours, to be equally divided and controlled by himself and Mr. Gifford. In response to the parliamentary inquiry of Mr. Cassius C. Dowell, of Iowa, the Speaker upheld the propriety of that clause in the resolution which required the Speaker to notify the Governor of Louisiana of the action taken by the House in declaring the seat vacant.

After debate, Mr. Kerr moved the previous question on the resolution, which was ordered by a voice vote. Thereupon, House Resolution 231 was agreed to by voice vote. The resolution stated:

Resolved, That there was no valid election for Representative in the House of Representatives of the Seventy-third Congress from the Sixth Congressional District of the State of Louisiana on the 5th day of December, or the 27th day of December, 1933, and that neither Mrs. Bolivar E. Kemp nor J. Y. Sanders, Jr., is entitled to a seat therein; and be it further

Resolved, That the Speaker communicate to the Governor of the State of Louisiana that there is a vacancy in the representation of that State in the Sixth Congressional District thereof.

Note: Syllabi for the Kemp, Sanders investigation may be found herein at §4.3 (House power over administration of oath to candidate in election contests);

§6.2 (items transmitted by Clerk); §9.1 (certificates of election); §§10.17, 10.18 (improperly conducted special election); §10.19 (improperly conducted primary elections); §42.12 (disposal of contest by resolution declaring seat vacant); §42.15 (resolution admitting neither contestant to a seat).

§ 47.15 Shanahan v Beck

Mr. John H. Kerr, of North Carolina, submitted the report⁽¹⁴⁾ of the Committee on Elections No. 3 on Feb. 9, 1934, in the election contest of John J. Shanahan against James M. Beck from the Second Congressional District of Pennsylvania. The contest had been referred to that committee on Jan. 5, 1934, on which date the Speaker⁽¹⁵⁾ had laid before the House a letter⁽¹⁶⁾ from the Clerk transmitting a copy of the notice of contest and reply, with the statement that no testimony had been received within the time prescribed by law and that the contest appeared to have abated. The Speaker had ordered that communication to be printed (not designated as a House document).

The report confirmed that "there was no evidence before the

14. H. Rept. No. 694, 78 CONG. REC. 2282, 2292, 73d Cong. 2d Sess.; H. Jour. 153.

15. Henry T. Rainey (Ill.).

16. 78 CONG. REC. 136, 73d Cong. 2d Sess.; H. Jour. 28.

committee of the matters charged in (the) notice of contest, and no briefs filed, as provided by law.” The committee found such “laches” to be inexcusable under the circumstances, but permitted contestant to withdraw unprinted evidence which he had submitted while testifying before the committee without prejudice. Finally, the report stated that contestee had evidently been elected by a majority of more than 14,000 votes in the election held Nov. 8, 1932.

The report accompanied House Resolution 259,⁽¹⁷⁾ which Mr. Kerr offered from the floor as privileged on Feb. 24, 1934. The resolution was agreed to by voice vote and without debate. It provided:

Resolved, That John J. Shanahan is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Second Congressional District of the State of Pennsylvania; and be it further

Resolved, That James M. Beck is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Second Congressional District of the State of Pennsylvania.

Note: Syllabi for Shanahan v Beck may be found herein at §15.3 (failure to take testimony within prescribed time); §16.2 (inexcusable delay in filing briefs in

taking testimony); §25.2 (failure to produce evidence); §22.1 (withdrawal of evidence).

§ 47.16 Weber v Simpson

On May 4, 1934, Mr. John H. Kerr, of North Carolina, submitted the report⁽¹⁸⁾ of the Committee on Elections No. 3 in the election contest brought by Charles H. Weber against James Simpson, Jr. and Ralph E. Church from the 10th Congressional District of Illinois.

At the conclusion of the 72d Congress, on Mar. 3, 1933, the Speaker⁽¹⁹⁾ had laid before the House a letter⁽²⁰⁾ from the Clerk transmitting a subpoena duces tecum served upon him by contestant’s notary public and requesting the production of documents filed by contestee (Mr. Simpson) in compliance with the Corrupt Practices Act. The Clerk’s letter included his reply by which he had refused to comply with the subpoena pending approval of the House. The communication and accompanying papers were referred to the Committee on the Judiciary and ordered printed (not

17. 78 CONG. REC. 3165, 73d Cong. 2d Sess.; H. Jour. 201, 202.

18. H. Rept. No. 1494, 78 CONG. REC. 8085, 8122, 73d Cong. 2d Sess.; H. Jour. 489.

19. John N. Garner (Tex.).

20. 76 CONG. REC. 5581, 72d Cong. 2d Sess.; H. Jour. 64.

designated as a House document). The 72d Congress did not authorize the Clerk to respond to the subpena duces tecum.

The contest was transmitted to the Seventy-third Congress on Jan. 16, 1934, on which date the Speaker⁽¹⁾ laid before the House a letter⁽²⁾ from the Clerk. The communication was referred to the Committee on Elections No. 3 and ordered printed (not designated as a House document).

At the general election held Nov. 8, 1932, contestee (Mr. Simpson) had received 101,671 votes to 100,449 votes for contestant and to 45,067 votes for Mr. Church, a plurality of 1,222 votes for contestee. Contestant thereafter examined the tally sheets in all of the 516 precincts comprising the 10th Congressional District, and found discrepancies in 128 precincts which reduced contestee Simpson's plurality to 920 votes.

Contestant requested that the committee order a recount of all ballots cast, based on the mistakes shown to have existed in 128 precincts. The committee denied this request, finding no evidence of irregularities, intimidation or fraud in the casting of ballots. The committee concluded

1. Henry T. Rainey (Ill.).

2. 78 CONG. REC. 760, 761, 73d Cong. 2d Sess.; H. Jour. 64.

that "contestant has failed to overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee." House Resolution 374⁽³⁾ was submitted on May 4, 1934, by Mr. Kerr with the report, and was referred to the House Calendar. As recommended by the committee, the resolution—

Resolved, That Charles H. Weber is not entitled to a seat in the House of Representatives of the Seventy-third Congress from the Tenth Congressional District of the State of Illinois; and further

Resolved, That James Simpson, Jr. is entitled to a seat in the House of Representatives of the Seventy-third Congress from the Tenth Congressional District of the State of Illinois.

The resolution was not called up during the 73d Congress.

Note: Syllabi for Weber v Simpson may be found herein at §6.13 (items transmitted by Clerk); §30.1 (Clerk's refusal to respond to subpena); §§36.1, 36.7 (official returns as presumptively correct); §44.7 (burden of proving recount would change election result); §42.20 (House failure to take action on reported resolutions).

§ 48. Seventy-fourth Congress, 1935-36

§ 48.1 Lanzetta v Marcantonio

3. 78 CONG. REC. 8085, 8122, 73d Cong. 2d Sess.; H. Jour. 489.