

Chapter CLVII.¹

THE OATH AS RELATED TO QUALIFICATIONS.

1. Provisions of the fourteenth amendment. Sections 56-59.

56. The case of Victor L. Berger, of Wisconsin, in the Sixty-sixth Congress.

For disloyalty to the United States, for giving aid and comfort to a public enemy, for publication of expressions hostile to the Government a Member-elect was denied a seat in the House.

The Committee on Elections declined to be governed by judgment and verdict of judge and jury of Federal court and proceeded to determine for itself the question of guilt or innocence of Member-elect charged with violation of Federal laws.

Nature and limitations of the constitutional power of expulsion discussed.

The constitutional power of expulsion is limited in its application to the conduct of Members of the House during their term of office.

On October 24, 1919,² Mr. Frederick W. Dallinger, of Massachusetts, from the Special Committee on Victor L. Berger Investigation, submitted the report of the majority of the committee.

On May 19, preceding,³ at the organization of the House, when the State of Wisconsin was called, during the administration of the oath to Members, Mr. Dallinger challenged the right of Victor L. Berger, a Member-elect from that State, to be sworn in. By direction of the Speaker⁴ the Member-elect stood aside and the administration of the oath to Members was concluded.

Thereupon Mr. Dallinger offered the following resolution which was agreed to:

Whereas it is charged that Victor L. Berger, a Representative-elect to the Sixty-sixth Congress from the State of Wisconsin, is ineligible to a seat in the House of Representatives; and

Whereas such charge is made through a Member of the House, and on his responsibility as such a Member, and on the basis, as he asserts, of public records and papers evidencing such an ineligibility:

¹Supplementary to Chapter XIV.

²First session Sixty-sixth Congress; House report 413; Record, p. 7475.

³Record, p. 8; Journal, p. 7.

⁴Frederick H. Gillett, of Massachusetts, Speaker.

Resolved, That the question of the prima facie right of Victor L. Berger to be sworn in as a Representative of the State of Wisconsin of the Sixty-sixth Congress, as well as of his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House, to be appointed by the Speaker; and until such committee shall report upon and the House decide such question and right, the said Victor L. Berger shall not be sworn in or be permitted to occupy a seat in this House; and said committee shall have power to send for persons and papers and examine witnesses on oath relative to the subject matter of this resolution,

The findings of fact by the committee appointed pursuant to this resolution are in part as follows:

Victor L. Berger was born in Austria in 1860 and came to this country in 1878, settling in Bridgeport, Conn.

In 1911 he started the Milwaukee Leader, which was at first a weekly and later became a daily paper, of which he has been the editor ever since. In 1910 he was elected as a Socialist to the Sixty-second Congress from the fifth district of the State of Wisconsin, taking the usual oath of a Member of Congress to support the Constitution of the United States, and serving from March 4, 1911, to March 4, 1913. At the election held on November 5, 1918, he was again elected as a Socialist to the Sixty-sixth Congress.

Diplomatic relations between the United States and Germany were broken off February 3, 1917, and in March, 1917, the President issued a proclamation calling a special session of Congress, which, on April 6, 1917, passed a joint resolution declaring the existence of a state of war between this country and the Imperial German Government.

On April 7, 1917, on the call of the executive committee, of which Victor L. Berger was one of the five members, there was convened in St. Louis an emergency national convention of the Socialist Party, at which a "Proclamation and War Program" was adopted, a copy of which will be found on page 117 of volume 2 of the printed hearings, and which ex-President Roosevelt characterized as "treason to the United States." This proclamation and war program was favorably reported to the convention by the committee on war and militarism, of which Victor L. Berger was a member, and his name was signed to the report.

On April 14, 1917, the Milwaukee Leader characterized the report as a "cool, scientific Marxian declaration," a copy of the entire editorial in which this characterization appears being reprinted on page 906, of volume 1 of the printed hearings; and on December 30, 1917, Berger published an editorial in the Milwaukee Leader entitled "The Party Will Stand No Wobbling," a copy of which will be found on page 907 of volume 1 of the printed hearings, which was plainly intended to intimidate D. W. Hoan, the Socialist mayor of Milwaukee, who had doubted whether he could subscribe to the Socialist war program without violating his oath of office.

This "Proclamation and War Program," which was signed by Victor L. Berger, was published in both the Milwaukee Leader and the American Socialist, and was printed and distributed in pamphlet form throughout the country, during the period from April to October, 1917, to the extent of over a million copies.

The St. Louis convention also adopted a platform making certain political demands, among them being "Resistance to compulsory military training and to the conscription of life and labor," and the "Repudiation of war debts."

On August 13, 1917, 300,000 copies of this platform were printed by order of Adolph Germer, the national secretary, and the platform was also published in the Milwaukee Leader September 8, 1917.

On July 18, 1917, at the time the Government was preparing to float a Liberty loan, the Milwaukee Leader referred to the repudiation of war debts plank in the Socialist platform as being a sentiment that would "gain rather wide popularity as time went on."

The American Socialist, of which J. Louis Engdahl was editor, Adolph Germer business manager, William F. Kruse and Irwin St. John Tucker frequent contributors, and the title to which was in the name of the national executive committee of the Socialist Party, of which Victor L. Berger was a member, contained a series of articles from the time of our entrance into the war

and throughout the year 1917, copies of which will be found in full in the Government exhibits of the printed hearings.

The article entitled "The Price We Pay," written by Irwin St. John Tucker, was afterwards printed as a pamphlet and widely circulated by Germer, the national secretary, during the summer of 1917. On June 9, 1917, the Milwaukee Leader in an editorial favorably commented upon this pamphlet and its sale was repeatedly advertised in its columns.

In the Milwaukee Leader, of which Victor L. Berger was the editor in chief, and for all articles in which, both at the Chicago trial and before your committee, he assumed full responsibility, there appeared during the period from June 18 to September 13, 1917, a series of editorials and articles, copies of which will be found on pages 514 to 530, inclusive, of volume 1 of the printed hearings. As a result of the publication of these articles, on October 3, 1917, the second-class mailing privilege of the Milwaukee Leader was revoked by the Postmaster General, on the ground that the matter there published evinced a purpose and intent to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, to promote the success of its enemies during the present war, and willfully cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces of the United States, and to willfully obstruct the recruiting or enlistment service in the United States, to the injury of the service and of the United States," under the provisions of section 1 of Title 12 of the act of June 15, 1917, commonly known as the espionage act. The Court of Appeals of the District of Columbia, a copy of the decree of which will be found on page 504 of volume 1 of the printed hearings, in affirming the judgment of the lower court in dismissing a petition for a writ of mandamus, says in regard to these articles:

"No one can read them without becoming convinced that they were printed in a spirit of hostility to our own Government and in a spirit of sympathy for the Central Powers; that, through them, appellant sought to hinder and embarrass the Government in the prosecution of the war."

In this opinion your committee concurs.

On February 2, 1918, Victor L. Berger, Adolph Germer, J. Louis Engdahl, William F. Kruse, and Irwin St. John Tucker were indicted by the grand jury in the District Court of the United States for the Northern District of Illinois, eastern division, for the violation of the provisions of sections 3 and 4 of Title 1, of the act of June 15, 1917, known as the espionage act.

Their trial, which was a most exhaustive one, began in Chicago on December 9, 1918, before Judge Landis and a Federal jury, and on January 8, 1919, the defendants were found guilty as charged in the indictment, and on February 20, 1919, each was sentenced to 20 years' imprisonment in the United States Penitentiary at Fort Leavenworth, Kans. An appeal from this decision was taken by the defendants, which is still pending in the United States Circuit Court of Appeals for the Seventh District.

Your committee decided at the outset that it would not be governed by the action of the judge and jury at the Chicago trial, but would carefully consider all the evidence both at that trial and in the proceedings before the Court of Appeals of the District of Columbia, together with all the evidence introduced at the hearings before the committee, to determine for itself the question of whether or not Victor L. Berger was guilty of a violation of the espionage act, whether or not he did give aid or comfort to the enemies of the United States during the war with Germany, and whether or not he is ineligible to a seat in the House of Representatives.

After a careful consideration of all the evidence, in the opinion of your committee the admitted acts, writings, and declarations of Victor L. Berger and of the men with whom he was associated in the management and control of the Socialist Party from the time of the entrance of this country into the war until their indictment by a Federal grand jury, giving such acts and the language of the writings and declarations their ordinary everyday meaning and without considering any other evidence, clearly establishes a conscious, deliberate and continuing purpose and intent to obstruct, hinder, and embarrass the Government of the United States in the prosecution of the war and thus to give aid and comfort to the enemies of our country. The writings and activities of Mr. Berger and his associates could have had no other purpose. That Victor L. Berger was disloyal to the United States of America and did give aid and comfort to its enemies at a time when its existence as a free and independent Nation was at stake there can not be the slightest doubt.

The briefs submitted in the case contended that the House was without authority to expel a Member-elect. As to this contention the majority report says:

Inasmuch as some question has been raised as to the authority of the House of Representatives to exclude a Member elect, it may be well to review briefly the legal precedents involved in the present case.

Section 5, Article I, of the Constitution of the United States, provides:

“Each House shall be the judge of the elections, returns, and qualifications of its own Members.”

Under this provision of the Constitution, the House of Representatives has always maintained its absolute right to exclude Members-elect and to prevent their taking the oath of office.

The report then discusses the right of the House to exclude, as maintained by decisions of the House, in the Kentucky Cases of 1867, the Whittemore case in the Forty-first Congress, the case of Cannon *v.* Campbell in the Fortyseventh Congress, and the Roberts case in the Fifty-sixth Congress. The report thus differentiates between the last two cases and the case at bar:

In the present case there is a fourth qualification prescribed by the Constitution, or rather a fourth prohibition, as the qualifications set forth in the Constitution are put in negative form, which applies to Representative elect Berger, and did not apply in the Cannon and Roberts cases. Section 3 of the fourteenth amendment to the Constitution of the United States provides as follows:

“No person shall be a Senator or Representative in Congress, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.”

In reference to this very plain prohibition of the Constitution, counsel for Representative elect Berger contends that the fourteenth amendment was adopted as a result of the Civil War and that section 3 has been entirely repealed by an act of Congress passed in 1898, which provided as follows:

“That the disability imposed by section three of the fourteenth amendment to the Constitution of the United States heretofore incurred is hereby removed.

“(U. S. Stats. L., vol. 30, ch. 389, p. 432.)”

It must be perfectly evident that Congress has no power whatever to repeal a provision of the Constitution by a mere statute, and that no portion of the Constitution can be repealed except in the manner prescribed by the Constitution itself. While under the provisions of section 3 of the fourteenth amendment Congress was given the power, by a two-thirds vote of each House, to remove disabilities incurred under this section, manifestly it could only remove disabilities incurred previously to the passage of the act, and Congress in the very nature of things would not have the power to remove any future disabilities. This was plainly recognized when the words “heretofore incurred” were placed in the act itself.

It was also seriously contended by counsel that section 3 of the fourteenth amendment was an outgrowth of the Civil War and that such a provision can not possibly apply to the present case. It is perfectly true that the entire fourteenth amendment was the child of the Civil War and that its main purpose was the security and protection of the political and civil rights of the African race. It is equally true, however, that its provisions are for all time, and are as the United States Supreme Court well said in the case of *Yick Wo v. Hopkins*, “universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or of nationality.” (*Yick Wo v. Hopkins*, 118 U.S., 369.) It is inconceivable that the House of Representatives, which without such an express provision in the Constitution repeatedly asserted its right to exclude Members-elect for disloyalty, should ignore this plain prohibition which has been contained in the fundamental law of the Nation for more than half a century.

57. The case of Victor L. Berger, of Wisconsin, continued.

As to the meaning of the words "aid or comfort" as used in the fourteenth amendment to the Constitution.

As to the meaning of the words "freedom of speech" as used in the first amendment to the Constitution.

A Member-elect, who had not taken the oath, was excluded from the House for disloyalty.

Interpretations of the words "aid and comfort" as used in the fourteenth amendment are reviewed:

On the question as to the meaning of the words "aid or comfort" as used in the fourteenth amendment, it was held in the case of *McKee v. Young*, in the Fortieth Congress, to which reference has already been made, that "aid and comfort may be given to an enemy, by words of encouragement, or the expression of an opinion from one occupying an influential position."

In the case of *Smith v. Brown*, in the same Congress, the only evidence relied upon to support the charge of disloyalty was a letter written by the contestee to a newspaper.

Interpretations of the meaning of the words "freedom of speech" as used in the first amendment are also reviewed:

It was argued at great length, both by Mr. Berger and his counsel, that his conviction at Chicago and any attempt to deprive him of his seat in Congress would be a violation of the freedom of speech and the press guaranteed by the first amendment to the Constitution of the United States.

In the case of *Abraham L. Sugarman v. United States* (249 U.S., 182) Mr. Justice Brandeis, in delivering the unanimous opinion of the court, said:

"But 'freedom of speech' does not mean that a man may say whatever he pleases without the possibility of being called to account for it."

In the case of *Charles P. Schenck et al. v. United States* (249 U.S., 47), which was a case of conspiracy in which the testimony was very similar and in some respects almost identical to that in the present case, Mr. Justice Holmes in delivering the unanimous opinion of the court said:

"But, it is said, suppose that that was the tendency of this circular, it is protected by the first amendment to the Constitution. Two of the strongest expressions are said to be quoted, respectively, from well-known public men."

* * * * *

"We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."

* * * * *

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right."

* * * * *

"It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917, in section 4, punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."

In the case of *Eugene V. Debs v. The United States of America* (249 U.S., 211), in which case the defendant Debs had been convicted and sentenced under the espionage act for a speech made by him at Canton, Ohio, on June 16, 1918, Mr. Justice Holmes in delivering the opinion of the court said:

“The main theme of the speech was socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do. * * *

“The defendant addressed the jury himself, and while contending that his speech did not warrant the charges, said: ‘I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone.’ The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.”

* * * * *

“There was introduced also an ‘antiwar proclamation and program,’ adopted at St. Louis in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance.”

* * * * *

“This document contained the usual suggestion that capitalism was the cause of the war and that our entrance into it ‘was instigated by the predatory capitalists in the United States.’ It alleged that the war of the United States against Germany could not ‘be justified even on the plea that it is a war in defense of American rights or American honor.’ It said, ‘We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage.’ Its first recommendation was ‘continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.’ Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect.”

Summarizing the conclusion of the committee on the authority of the House in the exclusion of a Member-elect the majority report continues:

Counsel for Representative-elect Berger spent considerable time both at the outset of these proceedings and throughout the hearings in arguing the proposition that the House of Representatives has no constitutional right to exclude a member-elect, even if guilty of treason or other crime, if he presents himself to the House with a certificate from the Governor of his State, showing that he has been duly elected; and that the only course open to the House is to permit the member in question to be sworn in as a member of the House and then to expel him by a two-thirds vote. As has already been stated, counsel also contended that the prohibition contained in section 3 of the fourteenth amendment to the Constitution is no longer applicable.

As has already been shown in this report, both of these contentions are unsound and are not supported either by principle or by precedent. In the first place, the House of Representatives has always insisted upon its right to exclude members-elect and has also consistently refused to expel a member once he has been sworn in for any offense committed by him previous to his becoming a member, on the ground that the constitutional power of expulsion is limited in its application to the conduct of members of the House during their term of office. In the second place, as has already been pointed out, the contention that section 3 of the fourteenth amendment to the Constitution is no longer applicable, is not worthy of serious consideration.

In conclusion the majority report holds:

When the attention of counsel for Representative-elect Berger was called to those recent decisions of the Supreme Court of the United States, he criticized them as being contrary to all the fundamental principles of Anglo-Saxon liberty.

Your committee is convinced that the members of the House of Representatives are bound by their oaths to support the Constitution of the United States which declares that instrument and all acts of Congress passed in pursuance thereof to be the supreme law of the land. Inasmuch, therefore, as the espionage act has been declared by the Supreme Court of the United

States to be in pursuance of the Constitution, no question can now be raised by law-abiding citizens as to its full force and virtue. The essential purpose of this act was to prevent persons from obstructing and embarrassing the Government in the prosecution of the war and all the evidence in this case conclusively proves that Victor L. Berger from the time of the outbreak of the war until his indictment by the Federal grand jury continually did willfully hinder, obstruct, and embarrass the Government of the United States and thus gave aid and comfort to its enemies, and in the opinion of your committee is unfit and ineligible to sit as a member of our highest lawmaking body. That he should be permitted, after his treasonable conduct, to occupy a seat in the American House of Representatives, is inconceivable. While there has in the past been some opposition on the part of a small minority to the well established practice of the House of Representatives in excluding unfit persons from membership on the ground that the House has no right to add to the qualifications prescribed in the Constitution, in the present case it is perfectly plain that under the Constitution itself, if the House is satisfied that Representative-elect Berger did give aid or comfort to the enemies of the United States, he is ineligible to a seat in this House, and it is not only the right but the constitutional duty of the House to exclude him. Your committee, therefore, recommends the adoption of the following resolution:

Resolved, That under the facts and circumstances of this case, Victor L. Berger is not entitled to take the oath of office as a Representative in this House from the fifth congressional district of the State of Wisconsin or to hold a seat therein as such Representative."

The report is concurred in by all members of the committee with the exception of Mr. William A. Rodenberg, of Illinois, who submits separate views in which, without taking issue with the committee as to the merits of the case, he advocates the suspension of action on the question involved until the court of appeals had passed upon the appeal at that time pending before it.

He did not, however, offer resolutions, and when the case came up in the House, November 10, 1919,¹ the resolution recommended by the majority of the committee was, after exhaustive debate, agreed to by the House, yeas 311, nays 1.

58. The Wisconsin election case of Carney v. Berger in the Sixty-sixth Congress.

A Member-elect found to have obstructed the Government in the prosecution of war, and to have given aid and comfort to its enemies, was declared ineligible to membership in the House.

The opinion of one Member of the Elections Committee, not necessarily approved by the House, is insufficient to establish a precedent.

In judging elections, qualifications, and returns of Representatives in Congress, the House does not consider itself bound by constructions placed upon State laws by the courts of the State.

Disqualification of the Member-elect does not authorize the seating of a contestant not found to be elected.

On October 24, 1919,² Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the committee in the Wisconsin case of Joseph P. Carney v. Victor L. Berger.

At this election Victor L. Berger, the contestee, received 17,920 votes; Joseph P. Carney, the contestant, received 12,450 votes; and William H. Stafford received 10,678 votes.

¹ Journal, p. 571; Record, p. 8219.

² First session Sixty-sixth Congress; House report No. 414; Record, p. 7475.

No question was raised as to the regularity of the election or the correctness of the election returns. The only question involved was the eligibility of the Member-elect and the seating of the candidate receiving the next highest number of votes in event of his being declared ineligible.

The case was fully stated in the report of the special committee appointed to investigate the eligibility of Victor L. Berger to a seat in the House, and the committee concurs in the opinions expressed in that report as follows:

In regard to the first question, your committee concurs with the opinion of the special committee appointed under House resolution No. 6, that Victor L. Berger, the contestee, because of his disloyalty, is not entitled to the seat to which he was elected, but that in accordance with the unbroken precedents of the House, he should be excluded from membership; and further, that having previously taken an oath as a Member of Congress to support the Constitution of the United States, and having subsequently given aid and comfort to the enemies of the United States during the World War, he is absolutely ineligible to membership in the House of Representatives under section 3 of the fourteenth amendment to the Constitution of the United States.

This question having been disposed of, the only question remaining is whether the contestant, who received the next highest number of votes, is entitled to the seat.

The committee decide:

The only congressional precedent cited by counsel for the contestant is the case of *Wallace v. Simpson* in the Forty-first Congress. In this case neither the contestant nor the contestee were sworn in at the convening of the House of Representatives. The matter was referred to the Committee on Elections and a subcommittee of that committee unanimously reported in favor of the contestant. This report however was based on three grounds:

First. That the ineligibility of the contestee involved the election of the contestant.

Second. That the election was void in six of the nine counties and the contestant had a majority in those counties.

Third. That if no counties were rejected, enough voters were prevented from voting by violence and intimidation to have given the majority in the district to the contestant if they had voted.

The first proposition, which is the one on which counsel for the contestant in the present case relies, was agreed to only by Mr. Cassna, the chairman of the committee, who drew the report; Mr. Hale agreed to the second and third propositions; and Mr. Randall to the third only. Under a rule of the House at that time a subcommittee was authorized to report directly to the House, and in this case the subcommittee recommended that the contestant be seated and the House accepted the report. (Rowell's Digest of Contested Election Cases, 1790-1901, p. 245.)

It is plainly evident, however, that the proposition that the ineligibility of the contestee involved the election of the contestant was simply the opinion of one member of the committee and did not establish a precedent for the House of Representatives. (Rowell's Digest of Contested Election Cases, 1790-1901, p. 220.)

Various other cases cited in support of the contestant's contention are discussed by the committee and held not sufficiently germane to be considered as precedents.

In discussing the Wisconsin case of *Bancroft v. Frear* so cited, the committee further declare:

It is contended, however, by counsel for the contestant in the present case that Congress is bound by the laws of the States and inasmuch as the case of *Bancroft v. Frear* is now the law in the State of Wisconsin, that the House of Representatives is bound thereby, and that Joseph P. Carney, the Democratic contestant, is therefore entitled to a seat in the House. Such, however, in the opinion of your committee, is *not* the law.

In summing up the case the committee conclude:

Your committee, upon all the law and the evidence, is of the opinion that, first, Victor L. Berger, the contestee, is not entitled to the seat to which he was elected; and, second, that Joseph P. Carney, the Democratic contestant, who received the next highest number of votes, is not entitled to the seat. Inasmuch as the special committee appointed under authority of House resolution No. 6 has already recommended to the House a resolution declaring the contestee ineligible, it is not necessary for your Committee on Elections No. 1 to make a similar recommendation. The committee, however, does recommend the adoption of the following resolutions:

Resolved, That Joseph P. Carney, not having received a plurality of the votes cast for Representative in this House from the fifth congressional district of Wisconsin, is not entitled to a seat therein as such Representative.

Resolved, That the Speaker be directed to notify the Governor of Wisconsin that a vacancy exists in the representation in this House from the fifth congressional district of Wisconsin."

The case was considered in the House on November 10, 1919,¹ immediately after the disposition of the case of Victor L. Berger. After brief debate the resolutions recommended by the committee were agreed to, and the seat was vacated.

59. The Wisconsin election case of Bodenstab v. Berger in the Sixty-sixth Congress.

Two committees of the House having adjudged a Member-elect to be ineligible to membership in the House of Representatives, and the House having twice refused to seat him, the committee a third time declared him to be ineligible, but did not consider it necessary to recommend a resolution to that effect.

The House, after declaring a Member-elect ineligible, refused to seat the candidate receiving the next highest number of votes.

The House declines to seat a candidate receiving less than a plurality of the votes cast in the district.

The English law under which a minority candidate succeeds to a vacancy resulting from the disqualification of the majority candidate is not applicable under the Constitution.

On February 5, 1921,² Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the majority of the committee in the Wisconsin case of Henry H. Bodenstab *v.* Victor L. Berger.

The contestee in this case was a candidate in a former election and received a majority of all the votes cast in the district in that election. When he appeared to take the oath, objection was made to his being sworn in and a special committee was appointed to investigate his eligibility to a seat in the House. The committee reported adversely, and on November 10, 1919, the House by a vote of 311 to 1 declared he was ineligible.

On the same day in the House, in deciding the case of Carney *v.* Berger, again declared him to be ineligible and vacated the seat.

Subsequently the Governor of Wisconsin called a special election to fill the vacancy thus created. At this election Victor L. Berger was again a candidate and received 24,350 votes, and Henry H. Bodenstab, the contestant, received 19,566.

¹Journal, p. 571; Record, p. 8262.

²Third session Sixty-sixth Congress, House report 1300; Record, p. 2085.

votes. No question was raised as to the regularity of the election or the correctness of the election returns, but on January 10, 1920, when the contestee again appeared to take the oath of office, the House by a vote of 330 yeas to 6 nays agreed to the following resolution:

Whereas Victor L. Berger, at the special session of the Sixty-sixth Congress, presented his credentials as a Representative elect to said Congress from the fifth congressional district of the State of Wisconsin; and

Whereas on November 10, 1919, the House of Representatives, by a vote of 311 to 1, adopted a resolution declaring that "Victor L. Berger is not entitled to take the oath of office as a Representative in this House from the fifth congressional district of the State of Wisconsin or to hold a seat therein as such Representative," by reason of the fact that he had violated a law of the United States, and, having previously taken an oath as a Member of Congress to support the Constitution of the United States, had given aid and comfort to the enemies of the United States, and for other good and sufficient reasons; and

Whereas the said Victor L. Berger now presents his credentials to fill the vacancy caused by his own ineligibility; and

Whereas the same facts exist now which the House determined made the said Victor L. Berger ineligible to a seat in said House as a Representative from said district: Now, therefore, be it

Resolved, That by reason of the facts herein stated, and by reason of the action of the House heretofore taken, the said Victor L. Berger is hereby declared not entitled to a seat in the Sixty-sixth Congress as a Representative from the said fifth district of the State of Wisconsin, and the House declines to permit him to take the oath and qualify as such Representative."

As the pleadings required by statute had not at that time been completed, no action was taken on the contest instituted by the contestant.

Subsequently when testimony and briefs had been submitted the committee reported:

Inasmuch as two committees of the House of Representatives have twice reported that Victor L. Berger, the contestee, is not eligible to membership in the House of Representatives, and inasmuch as the House of Representatives itself has twice, by an overwhelming vote, refused to seat the said Victor L. Berger, the contestee, on the ground that he is ineligible to membership therein, and inasmuch as there is no additional testimony in this case, your committee finds that Victor L. Berger, the contestee, is ineligible to membership in the House of Representatives, but recommends no resolution, for the reason that the House of Representatives has already finally determined that question so far as the present Congress is concerned.

This phase of the case having been disposed of the only question remaining to be considered was whether the contestant was entitled to the seat.

At the time of the regular election held November 5, 1918, the contestee, Victor L. Berger, had already been indicted for violation of the espionage act. At the time of the special election on December 19, 1919, he had been convicted of the crime for which indicted, and sentenced to imprisonment in the Federal penitentiary. Moreover, the House of Representatives had by resolution declared him ineligible to a seat in the House. It is evident, therefore, that those who voted for him at the special election must have had ample notice at the time of the fact that he had been adjudged ineligible.

For this reason the minority views, submitted by Mr. Clifford E. Randall, of Wisconsin, argue that the votes cast for contestee are void and that as the con-

testant received a majority of the votes cast for an eligible candidate, he is entitled to be seated.

In support of that doctrine he cites numerous cases, including that of *Bancroft v. Frear* decided by the Supreme Court of Wisconsin. (Vol. 144, p. 79, Wisconsin Reports.)

The majority, however, hold this position untenable, and say that while this is the prevailing doctrine in Great Britain, it has never been recognized by the United States House of Representatives.

The majority report continues:

The committee found that precisely the same question was raised in the contested-election case of *Maxwell v. Cannon* in the Forty-third Congress; in the case of *Campbell v. Cannon*, in the Forty-seventh Congress; and in the case of *Lowry v. White*, in the Fiftieth Congress; in all of which the Committee on Elections of the House of Representatives rejected the doctrine that where the candidate who received the highest number of votes is ineligible, the candidate receiving the next highest number of votes is entitled to the office.

In the previous case of *Carney v. Berger*, your committee also considered very carefully the general question of whether Congress is bound by the law of the State in which the contest arises.

After an exhaustive examination of the authorities, your committee came to the unanimous conclusion that where the law of a State in a matter of this kind is contrary to the unbroken precedents of the House of Representatives in election cases the congressional precedent must prevail, anything in the laws of the State or decisions of its supreme court to the contrary notwithstanding.

While it is true that in the present case the voters of the fifth congressional district of Wisconsin can fairly be said to have had constructive notice of the fact that Victor L. Berger, the contestee, was ineligible to membership in the House of Representatives, which circumstances was lacking in the case of *Carney v. Berger*, nevertheless this additional fact offers no reason why you committee and the House of Representatives should allow a decision of the Supreme Court of Wisconsin or of any other State to override an unbroken line of congressional precedents and establish a new rule in determining contested-election cases in the Congress of the United States.

The majority then discuss the case of *McKee v. Young*, cited as a precedent for the seating of the contestant, failing to find any parallel between that case and the present case, and quoting at length from the statement of the Committee on Elections in its report on the case of *Smith v. Brown* in the Fortieth Congress in opposition to the English rule.

In summing up the law and the evidence the majority of the committee conclude that while Victor L. Berger is not entitled to the seat and has been so adjudged by resolution of the House, neither is Henry H. Bodinstab entitled to it, and accordingly recommend the following resolution:

Resolved, That Henry H. Bodinstab, not having received a plurality of the votes cast for Representative in this House from the fifth congressional district of Wisconsin, is not entitled to a seat therein as such Representative.

The minority concur in the findings of fact as stated by the majority report, but differ sharply in their views as to the law applicable to the case.

The English rule, under which the candidate having the next highest number of votes is seated when the majority candidate is disqualified, is stressed, and the following distinction drawn between cases relied upon by the majority and the case under discussion:

The precise question involved in this case has never been before the House of Representatives. The majority opinion refers to, relies upon, and quotes with approval several House decisions in election cases which are supposed to be inconsistent with the principles of law hereinbefore stated. Examination of these cases demonstrates clearly that in none of them was it established that the electors had knowledge of the ineligibility of the candidate voted for.

Each case is discussed separately and the lack of knowledge of the candidate's ineligibility on the part of the voters at the time of the election is pointed out.

The minority conclude with the recommendation of a resolution declaring Henry H. Bodestab elected and entitled to a seat in the House of Representatives.

The report was briefly debated in the House on February 25, 1921,¹ and the resolution of the minority declaring the contestant elected was disagreed to. The resolution recommended by the majority was then agreed to, and the seat remained vacant.

¹Journal, p. 248; Record, p. 3883.