

Chapter CLX.¹

CREDENTIALS AND PRIMA FACIE TITLE.

1. Questions as to validity of Section 88

88. The Senate case of John W. Smith, from Maryland, in the Sixtieth Congress.

The credentials of a Senator elect being regular and there being no contest, the Senate seated the bearer on prima facie showing, although credentials and Senate records indicated that he had been elected in advance of time prescribed by law.

Discussion as to whether a law was mandatory or directory.

On March 26, 1908,² in the Senate, Mr. Isidore Rayner, of Maryland, presented the following credentials of John Walter Smith, elected a Senator by the Legislature of Maryland:

THE STATE OF MARYLAND,
EXECUTIVE DEPARTMENT.

To the President of the Senate of the United States:

This is to certify that on the 25th day of March, 1908, John Walter Smith was, in accordance with law, duly chosen by the legislature of the State of Maryland a Senator from said State to represent said State in the Senate of the United States for the unexpired portion of the term of six years, beginning on the 4th day of March, 1903, to fill the vacancy caused by the decease of Hon. William Pinkney Whyte.

Witness his excellency our governor and our seal hereto affixed, at Annapolis, this 25th day of March, in the year of our Lord 1908:

[SEAL]

By the Governor:

AUSTIN L. CROTHERS.

N. WINSLOW WILLIAMS,
Secretary of State.

Mr. Rayner moved that the oath be administered, when Mr. Julius C. Burrows, of Michigan, objected to administration of the oath for the reason that the election was not in accordance with the act of 1866.

That portion of the act of 1866 enacted as section 17 of the Revised Statutes provided:

SEC. 17. Whenever, during the session of the legislature of any State, a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy.

¹Supplementary to Chapter XVIII.

²First session Sixtieth Congress, Record, p. 3938.

According to the Journal of the Senate, the death of Senator Whyte and the ensuing vacancy occurred on the 17th day of March. The second Tuesday thereafter fell on March 31. The Legislature of Maryland, however, under necessity by constitutional limitations of adjourning prior to that date, proceeded to the selection of a successor, resulting in the election of Mr. Smith on March 25, one week in advance of the time prescribed by the statute.

In stating his contention Mr. Burrows said:

My contention is that the legislature of Maryland, in proceeding to the election of a Senator on the 25th day of March to fill the vacancy occasioned by the death of Senator Whyte, which occurred on the 17th day of the same month, acted prematurely and in violation of the statute of 1866.

I have taken occasion to look over the precedents of the Senate since 1866, when this measure was enacted. There have been fourteen deaths in the Senate at a time when the legislature of the State in which the vacancy happened was in session and in not one single instance has any State presumed to defy or ignore this statute and elect until the second Tuesday after they were notified of the vacancy.

The cases are all like the one now pending before the Senate—a death during the session, an election by the legislature after the legislature had been notified and the second Tuesday after such notification—and in no single instance has a Senator been permitted to take his seat who has not conformed to that statute.

In all the cases in every State where a vacancy has occurred in the representation in the Senate from such State during the session of the legislature that legislature has conformed to the statute and waited before filling the vacancy until the second Tuesday after notice of the vacancy.

Now, I submit, Mr. President, to admit the gentleman holding these credentials to a seat in this body is not only in violation of the Constitution and laws of the United States, but he has not even a prima facie ease which would entitle him to admission. I insist, therefore, to admit Mr. Smith under these circumstances will be to reverse the judgment of the Senate for forty years, overthrow all precedents, and receive into the membership of this body a person under circumstances which can not for one moment, in my judgment, be justified.

Mr. Rayner argued that the statute was merely directory and not mandatory, citing in support of that interpretation reports in the cases of *Hart v. Gilbert* in the Forty-first Congress and *Lapham v. Miller* in the Forty-seventh Congress.

Mr. Rayner further said:

There is no contestant here at all. There is no protest whatever against the seating of the Senator-elect. Senator Whyte died last Tuesday a week at 7 o'clock. The general assembly of Maryland, then in session, had immediate notice of his death. The law does not speak of any official notice, and does not require any.

On the following Tuesday—that is to say, Tuesday of this week—the two houses initiated their proceedings for the election of a Senator to fill the unexpired term of Senator Whyte. They met on Tuesday for that purpose, and yesterday, Wednesday, met in joint convention. The Senator-elect who is now present was declared in accordance with the law to have received the majority of votes and to be duly elected Senator. The Legislature of Maryland adjourns next Monday by constitutional limitation. If the Senator is right in what he states, Maryland will be without its proper representation upon this floor.

* * * * *

I rest upon these four propositions: First, that the section is not entitled to the interpretation the Senator from Michigan puts upon it; second, that the section is only directory, not mandatory; third, the State of Maryland has decided it; and fourth, if I am all wrong in everything else I have said, the Senator-elect is now entitled to be sworn in, and this question should go to the committee, as has been done in every other case, for further examination. I ask, therefor, that the Senator be sworn in.

Mr. Burrows offered the following:

Resolved, That the credentials of John Walter Smith, claiming a seat in the Senate from the State of Maryland, be taken from the files of the Senate and referred to the Committee on Privileges and Elections.

The resolution was disagreed to, yeas 28, nays 34.

The question recurring on the motion offered by Mr. Rayner, it was decided in the affirmative without division.

Mr. Smith then took the oath.