

## Chapter CLXII.<sup>1</sup>

### THE HOUSE THE JUDGE OF CONTESTED ELECTIONS.

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1. House not bound by agreement of parties. Section 90.
  2. House not bound by decisions of State tribunals. Sections 91, 92.
  3. Relations of House to acts of canvassing officers. Sections 93-95,
  4. House ascertains intent of voter when ballot is ambiguous. Section 96.
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#### **90. The Connecticut election case of Jodoin v. Higgins in the Sixty-second Congress.**

**A stipulation by parties for a recount of ballots is not binding on the House or its committees.**

**Although not bound by agreement of parties for a recount of ballots, the committee in view of the difficulty in securing a recount under the laws of the State, and evidence indicating the probability of inaccuracy in the returns, ordered a recount.**

On August 3, 1912,<sup>2</sup> Mr. Henry M. Goldfogle, from the Committee on Elections No. 3, submitted the report of the committee in the Connecticut case of Raymond J. Jodoin v. Edwin W. Higgins.

Under the law of the State of Connecticut a recount of ballots might be had only when application was made within three days after the election by an elector in the town in which recount was desired.

However, after answer had been served to the notice of contest, the parties and their attorneys entered into a stipulation dated March 16, 1911, in which, among other things, the following was stated:

That in many voting districts it is probable that the moderators were mistaken in their decisions as to the validity or invalidity of ballots cast for said office of Representative in Congress from said district, and that without opening the boxes and examining the ballots therein it is impossible to determine the extent of such mistaken decisions.

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That it is impossible to tell with accuracy what ballots have been improperly counted or rejected for the contestant or contestee without opening said boxes and examining said ballots.

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That said contestant desires that said boxes be opened and said ballots examined and recounted and that the lawful and correct count of said ballots be ascertained thereby without objection on the part of the contestee.

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That said contestant and contestee waive any question of formality or sufficiency of the pleadings as to said matter of contest and agree that all issues are properly raised and presented

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<sup>1</sup>Supplementary to Chapter XXI.

<sup>2</sup>Second session Sixty-second Congress, House Report No. 1136; Record p. 10145; Moore's Digest, p. 51.

for the opening of said ballot boxes and for a recount of all the ballots cast at said election for the office of Representative in Congress for said congressional district in said Sixty-second Congress.

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That said contestant and contestee stipulate and agree to waive any and all claims which they or either of them might make under any of the pleadings or any part of the proceedings for the determination of said question so that a full recount of all ballots cast for Member of Congress from said congressional district in said Sixty-second Congress may be had.

The congressional district affected was composed of 36 towns. In only one of the 36 was application made within the 3 days specified, but on recount in the one town the contestant gained 3 votes, indicating the possibility of similar changes in the returns from other towns in event of a general recount.

The committee held that:

A stipulation of parties to an election contest for a recount of ballots cast for Representative in Congress is not binding or conclusive either on the House of Representatives or its Committee on Elections. In view, however, of the stipulation to which we have above referred and of the declarations upon the hearings by the counsel for the contestee of his willingness that such recount should be had, and of the circumstances existing with regard to the counting of the vote in the town of Plainfield which reduced the meager majority by which the contestee was declared elected, and of the difficulty that the contestant would experience to secure a recount under the Connecticut law within the very brief period of time limited by the laws of that State, the committee concluded to give heed to the stipulation and render it effective by ordering a recount.

On March 21, 1912,<sup>1</sup> Mr. Goldfogle offered the following resolution in the House which was agreed to:

*Resolved*, That the Committee on Elections No. 3 be, and it hereby is, authorized to send for ballots cast for Representative in Congress in the third congressional district of Connecticut, at the election held in November, 1910, and that such ballots be brought from said congressional district by such person as may be designated by the committee or its chairman, and the expenses incurred therefor shall, upon vouchers approved by the chairman of the committee, be paid out of the contingent fund of the House.

In compliance with this resolution the ballots were brought from Connecticut and opened by the committee in the presence of counsel and representatives of both parties to the contest, but before the completion of the recount the counsel for the contestant announced that from an examination of the ballots he was convinced that the returns would not be materially changed by the recount. The committee, therefore, without proceeding further with the recount recommended resolutions declaring that Raymond J. Jodoin was not elected and Edwin W. Higgins was elected.

The House agreed to the resolutions without debate or division.

**91. The Michigan election case of Camey v. Smith in the Sixty-third Congress.**

**The House in deciding a Federal election case, acts in the capacity of a court and is not bound by decisions of State courts unless such decisions are founded upon sound principles and comport with reason and justice.**

**Decisions of State tribunals are not binding on Congress for the reason that State election laws are made Federal laws by the Federal Constitution.**

<sup>1</sup> Journal, p. 919: Record, p. 3766.

**A recount of ballots having been agreed upon by contestant and contestee it is the duty of the House to accept the revision in official returns made by such recount.**

**Votes sought to be influenced by election officials must be rejected.**

**Where the soliciting of votes by election officials continued during the whole day the entire poll should be rejected, but where solicitation is shown to have applied to a limited number of votes those votes only should be deducted from the poll.**

**Irregularities in the conduct of an election unaccompanied by fraud do not vitiate the returns.**

**Adjournment of election officials contrary to provision of law before completion of the count, where untainted with fraud or misconduct does not warrant rejection of the poll.**

On January 30, 1914,<sup>1</sup> Mr. James D. Post, of Ohio, from the Committee on Elections, No. 1, submitted the report in the Michigan case of *Claude C. Carney v. John M. C. Smith*.

The contest in this case was predicated on various irregularities in several precincts in the district.

In Climax Township of Kalamazoo County, a recount made by agreement between the parties reduced contestee's plurality in the district from 127 to 116. The recount having been made by mutual agreement the committee held:

Your committee makes no question as to the right and duty to accept the revised figures as to the township of Climax. We do not believe that in the original canvass of the votes in that township there was any intentional fraud. The evidence shows that the election officials were unanimously of the opinion that when the original figures were received that they could not be correct; that more votes had been cast in that precinct than the total as shown by the returns. Besides, contestant and contestee agree that the correction should be made.

In ward 3, of the city of Charlotte, Eaton County, inspectors of the election repeatedly went into the booths when voters were preparing their ballots. Section 3642, Michigan Compiled Laws of 1897, paragraph 169 provides:

When an elector shall make oath that he can not read English, or that because of physical disability he can not mark his ballot, or when such disability shall be made manifest to said inspectors his ballot shall be marked for him in the presence of the challenger of each political party having a challenger at such voting place, by an inspector designated by the board for that purpose, which marking shall be done in one of the booths.

Paragraph 170 of section 3643 further provides:

It shall be unlawful for the board, or any of them, or any person in the polling room or any compartment therewith connected, to persuade or endeavor to persuade any person to vote for or against any particular candidate or party ticket.

It developed that the inspectors entered the booths without requiring the oath specified in the statutes.

The opinion of the Supreme Court in the case of Attorney General *v. McQuade* (94 Mich., 439) was cited to show this statute was mandatory, and on this ground

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<sup>1</sup>Second session Sixty-third Congress, House report No. 202; Record, p. 2586.

it was urged that the entire poll of ward 3 of the city of Charlotte should be thrown out.

The committee, decided:

We must concede under the case cited, the law in this respect being mandatory, that the votes sought to be influenced by the election inspectors must be cast out. In the McQuade case the court cites with approval the following excerpt from Payne on Elections, section 499, and McCreary on Elections, sections 190 and 192:

“When fraud on the part of the officers of the election is established, the poll will not be rejected, unless it shall prove to be impossible to purge it of fraud. When the result at a poll, as shown by the returns, is false and fraudulent, and it is impossible to ascertain the actual vote from the other evidence in the case, the vote of such poll must be wholly rejected.”

This rule is certainly founded in good sense and is sustained by the overwhelming weight of the authorities.

In the American and English Encyclopedia of Law, page 353, the rule is thus bid down:

“Fraud does not invalidate the legal votes cast, but by destroying the presumption of the correctness of the returns it makes it necessary that any person who claims any benefit from the votes shall prove them; and where no proof is offered and the frauds are of such a character that the correct vote can not be determined, the return of the precinct will be rejected.”

The total vote cast in this precinct was 363. The record shows the mistake complained of did not apply to more than 8 votes. Should 355 voters be disfranchised, the integrity of whose ballots can not be and is not questioned? To segregate the tainted votes in this ward would be in harmony with the great weight of the authorities, and give full force and effect to the mandatory provisions of the Michigan laws relative to the marking of the ballots, but we do not believe that more than 8 votes should be deducted from the poll in this precinct. We believe such a conclusion is in exact accord with the intent and spirit in the decisions laid down in the case of the Attorney General *v.* Furgason (91 Mich., 438) and Attorney General *v.* May (99 Mich., 545).

If the records show that the soliciting of votes in this precinct was open and continued during the whole day, the opposite conclusion should be reached; but we have searched the record in vain to find that these two election inspectors solicited any of the voters except those who called for instructions. In neither of the three cases cited, and upon which the contestant relied, did the Supreme Court of Michigan hold that the entire poll should be vitiated

In Sunfield Township of Eaton County the board adjourned before completion of the count, leaving the ballots and books in the voting place. Subsequently on the same night they reassembled upon advice of the prosecuting attorney and continued the counting. It was not claimed or shown that there was any disturbance of the ballots or modification of figures during the adjournment, and the committee held:

I do not believe that any one would contend for a single moment that the poll of this precinct should be thrown out simply on account of this unwarranted adjournment. To disfranchise the 345 electors who voted in this township at that election upon this mere irregularity would certainly be a most dangerous precedent.

Upon the question of a recess taken by the officers, we cite Payne on Elections, section 463:

“A recess of an hour taken by the officers at noon for dinner without fraudulent or wrongful purpose or result will not warrant the rejection of the poll of the precinct.”

It is decided even in Michigan, in the case of *The People v. Avery* (102 Mich., 572), that electors are not to be deprived of the result of their vote at an election by mere mistakes of their officers when it does not appear to have changed the result.

A further complaint was that in this township the board without authority of law appointed one Albert Sayer to deliver ballots to the voters. Section 3640 of the Michigan Compiled Laws of 1897 provides:

No ballot shall be distributed by any person other than one of the inspectors of the election, nor in any place within the railing of the voting room, to show electors how to vote, and no ballot which has not the initials of a member of the board of election, written by such member on the back thereof, shall be placed in the ballot box.

On the strength of this statute the contestant claimed that the entire vote of this precinct should be thrown out, and cited in support of that contention a decision of the Supreme Court of Michigan in the case of *McCall v. Kirby* (120 Mich., 592).

However, as nothing of a dishonest nature was claimed or shown to have been done by Sayer, the committee decided:

We do not believe that a committee of this House, looking for the truth to determine who in fact was elected by the voters, should, on account of this irregularity, disfranchise the electors of this township. No question is made but that the ballots cast in this precinct were cast by legal voters and in good faith. Nor is it claimed that the contestee received a single vote more than was intended to be cast for him, or that the contestant lost a single vote. We do not believe that the facts warrant the rejection of the entire poll of this township, nor does the law as practiced in almost every jurisdiction warrant such a result. McCreary on Elections, section 488, says:

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

Paine on Elections, section 497, says:

“Ignorance, inadvertence, mistake, or even intentional wrong on the part of the local officers should not be permitted to disfranchise a district.”

Section 498 says:

“The rules prescribed by the law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, to prevent illegal votes, and to ascertain with certainty the result.

“The departure from the mode prescribed will not vitiate an election, if the irregularity does 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 a benefit from them.

“Power to throw out the vote of an entire precinct should be exercised only under circumstances which demonstrate beyond a reasonable doubt that there has been such a disregard of law or such fraud that it is impossible to determine what votes were lawful or unlawful, or to arrive at any result whatever, or whether a great body of voters have been prevented from exercising their rights by violence or intimidation. (Case of *Daley v. Petroff*, 10 Philadelphia Rep., 389.)

“There is nothing which will justify the striking out of an entire division but an inability to decipher the returns or a showing that not a single legal vote was polled or that no election was legally held. (In *Chadwick v. Melvin*, Bright’s Election cases, 489.)

“Nothing short of an impossibility of ascertaining for whom the majority of votes were given ought to vacate an election, especially if by such decision the people must, on account of their distant and dispersed situation, necessarily go unrepresented for a long period of time. (McCreary on Elections, 489.)

“If there has been a fair vote and an honest count, the election is not to be declared void because the force conducting it were not duly chosen or sworn or qualified.”

In the second ward of the city of Charlotte, Eaton County, it was charged that one John C. Nichols, who was at the time a candidate for circuit court commissioner was asked to assist during the illness of one of the election inspectors, and deposited some ballots in the box.

Section 3612 of the Michigan Compiled Laws of 1897 provides that no person shall act as inspector who is a candidate for office at such election. The contestant

claimed that under the decision of the Supreme Court of Michigan, passing upon a similar case, the entire vote of this ward should be rejected.

The committee, however, say:

It is contended by the contestant that the Supreme Court of Michigan upon the points involved ought to be followed by Congress, and that it is against the settled doctrine of both Congress and the Federal judiciary to disregard the decisions of State tribunal in construing their own laws. The position can not be successfully maintained. Where a line of decisions have been made by the judiciary of a State and those decisions have become a rule of property, the Federal judiciary will follow them; but the rule is different as to all other cases. In the case of the Township of Pine Grove *v.* Talcott (19 Wall., 666), the Supreme Court of the United States in passing upon the validity of a Michigan statute says:

"It is insisted that the invalidity of the statute has been determined by two judgments of the Supreme Court of Michigan and that we are bound to follow these adjudications.

"With all due respect to the eminent tribunal by which these judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of States where the cases arise; it must hear and determine for itself. It must be conceded that in matters not local in their nature the Supreme Court of the United States has uniformly held that the decisions of the State courts were not binding upon it. (*Swift v. Tyson*, 16 Pet., 1-18.)"

A cogent reason why Congress should not be bound by decisions of State tribunals with regard to election laws, unless such decisions are founded upon sound principles and comport with reason and justice, is that every State election law is made a Federal law by the Constitution of the United States, where Congress has failed to enact laws on that subject. To say that Congress shall be bound absolutely by the adjudication of the State courts on the subject of the election of its own Members, is inimical to the soundest principles of national unity. If a State legislature should pass a law unreasonable and unjust in its terms, and the State courts should uphold such unreasonable and unjust law, should Congress be bound by such law or adjudication? To say that it should would be subversive of the constitutional provision that each House shall be the judge of the election, qualifications, and returns of its own Members.

The House in deciding upon a Federal election case acts in the capacity of a court, and it should not be bound by decisions of the State courts unless the reasons given by them are not only convincing but sound. There was cast in the second ward, city of Charlotte, county of Eaton, 300 votes for the office of Representative in Congress. By a fair preponderance of the evidence it is shown that John C. Nichols did not handle more than 7 ballots; no question was made as to the honesty and bona fides of the voters who cast the 300 ballots for Representative in Congress. So far as the evidence discloses, every ballot was cast by a qualified elector. To cast out this entire poll and disfranchise 300 electors, every one of whom intended to and did honestly vote for some one of the candidates for Congress, does not, in our opinion, comport with the precedents firmly established by this House. In the absence of any proof of misconduct or fraud on the part of the election inspectors, or on the part of John C. Nichols, to nullify the poll of this ward, would not be in keeping with the precedents of the House. We believe that the entire poll should be counted as cast and canvassed in accordance with the canvass made by the supervisors of elections. The very most that your committee believes that the contestant can claim is that the 7 ballots alone might be purged from the poll. To go beyond this, in our opinion, would be to do violence to the expressed will of the public.

## **92. The case of Carney v. Smith, continued.**

**Mistakes of election officials, neither operating to change the result nor accompanied by fraud, do not warrant rejection of the poll.**

**Error of election officer in removing initials properly affixed as required by law does not invalidate ballot.**

**Opening of the ballot box in violation of law and swearing in of unauthorized clerks held, in the absence of fraud, not to vitiate the vote. Illegal votes should be deducted from the total vote in proportion to the entire vote returned for each candidate.**

In Carmel Township, of Eaton County, it is alleged that as the voting proceeded the ballot became full and the election officers thereupon unlocked the box and poured the ballots out upon a table. They reclosed the box and continued to receive ballots and deposit them in the box. Also that two outsiders were called in and sworn as extra clerks. That these two clerks sorted the ballots which had been poured out on the table, placing the straight Democratic votes in one pile, the straight Republican votes in another pile, and the split votes in a third pile.

Section 3618 of the Michigan Compiled Laws of 1897 provides:

That the box shall not be opened during the election except as provided by law in case of adjournments.

In view of this provision the contestant contends, first, that the opening of the box before the closing of the polls vitiated the entire poll; second, that the tally by two persons not members of the board violated the secrecy and integrity of the ballot of the voter and therefore vitiated the entire poll.

The committee decide as to the first proposition:

As to the first proposition: It was very unfortunate that the election inspectors did not procure another box in which to deposit the ballots after the ballot box furnished them by the proper authorities had become filled, yet there is no law of Michigan providing for the use of a second ballot box. The contingency seems to have been wholly overlooked by the State legislature. Had they adopted this course and procured another box no doubt complaint would have been made that this would vitiate the entire poll, because there was no law permitting the use of a second ballot box. The judges of the election were confronted by a condition; they were compelled to adopt some means for the conduct of the election during the remainder of the afternoon, and while some other method might have been less objectionable as the one adopted, yet in the absence of any showing of fraud we do not believe that the whole poll should be cast out for the fact that the ballot box was opened and emptied of its contents before the time prescribed by law.

As to the second proposition:

As to the second proposition. The two clerks did not leave the voting place until after 5 o'clock; the ballots were separated, the straight tickets and split tickets being placed in separate piles. There was no evidence to show that any voter had access to any of the ballots. The only information that voters might receive in passing by the table would be the announcement of a name by an inspector. It is not shown that any voter saw either of the tally sheets kept by the clerks. While this was an irregularity that should not be encouraged, your committee does not believe that it destroys the secrecy or integrity of the ballot.

In Windsor Township of Eaton County, it was discovered that the ballots were not initialed by the election officials.

Section 3640 of the Michigan Compiled Laws of 1897 provides:

No ballot shall be distributed by any person other than one of the inspectors of election, nor in any place except within the railing of the voting room, to electors about to vote, and no ballot which has not the initials of a member of the board of election written by such member on the back thereof shall be placed in the ballot box.

On this point the report cites the opinion of the Supreme Court of the State of Michigan in the case of *The People v. Avery* (102 Mich. 572):

We have frequently held that the electors are not to be deprived of their votes by mere mistakes of their election officers when such mistakes do not indicate that the result has been changed thereby, and many things may occur that can be treated as irregularities.

The report continues:

It must be borne in mind that the acts complained of was the mistake on the part of the supervisor in initializing the ballots and no act on the part of the electors.

In *Loranger v. Navarre* (102 Mich., 259) we find this language:

“The voter finding the ticket upon the official ballot is not required to determine its regularity at his peril. This might involve a necessary knowledge of facts difficult to ascertain. He may safely rely upon the action of the officers of the law, whom he has a right to suppose have done their duty.”

In *The People v. Avery* (102 Mich., 572) this principle is laid down:

“The electors are not to be deprived of the result of their votes at an election by the mistake of election officers when it does not appear to have changed the result.”

The committee, therefore, deduce that acts done by the elector are mandatory, while those by the inspector are directory, and quote supporting citations from *McCreary on Elections*, from *Paine on Elections*, and the decision of the Michigan court in the case of *People v. Rinehaxt*, and conclude:

The committee having under consideration the questions involved make these observations: The voter is not to be deprived of his right and the citizens are not to lose the result of an election fairly held because of some important omission of form or of the neglect or carelessness or ignorance on the part of some election officers or the failure to carry out some important direction of the law.

In the case of *Cox v. Straight*, volume 2 *Hinds' Precedents*, 142, the House unanimously held that irregularities unaccompanied by fraud did not vitiate the returns. Now, let us apply these salutary rules to the case in hand. The proper inspector initialed the ballots above instead of below the perforated line. The ballot was given to the voter, who marked the same, returned it to the proper inspector, who, on receiving the ballot, would determine that the ballot was initialed by the proper inspector. By this procedure no spurious ballot could have been placed in the ballot box and no fraud could have occurred. The record does not disclose that either the electors or the inspectors knew any mistake had been made in the initialing of the ballots. The ballots were voted and counted without their validity being questioned. There is nothing to indicate that the inspector who marked them, or the elector who voted them, discovered they were not properly marked or that there was any wrong intended by anyone in connection with the transaction, nor could it be told for whom any individual elector voted. Under such a state of facts, should the electors voting these tickets be disfranchised? How could such a transaction destroy the integrity or secrecy of the ballot? Your committee feels impelled to follow the reasoning of a long line of decisions of the Supreme Court of Michigan, and the conclusion reached in the *Homing* case, than to adopt the more recent rule enunciated in the *Rinehart* case, and in so doing hold that there was nothing shown by the contestant to vitiate the poll in this township.

In the second precinct, second ward of Battle Creek, Calhoun County, the election officials in making up the statement sheets showing the results of the election omitted to credit the candidates with the number of straight votes each candidate had received, and gave the candidates from governor down credit only for the number of votes each had received upon the split tickets. The result showed that contestant had received 23 votes and the contestee 31 votes. The error being discovered, the board of county canvassers caused the ballot box to be brought before them on November 13, and corrected the returns, adding to the 31 votes already

recorded for Smith 66 straight votes, making a total of 97; and to the 23 already recorded for Carney, 38 votes, making a total of 61.

The contestant complains that the action of the county board of canvassers and supervisors of the election, in changing the final returns, was in violation of the provisions of the law; that the board of county canvassers were obliged to canvass the vote according to the returns made by the inspectors on the night of the election; and that the board of election inspectors had no authority to reconvene and correct the returns. By the express terms of section 3665, Michigan Compiled Laws, 1897, the board of county canvassers are given, if they find a mistake has been made, power to correct the returns. The committee accordingly find:

It might well be said that the mistake that was made in this ward, being apparent from the face of the papers, from the fact that the presidential electors had received a vote largely in excess of the candidates from the governor down, was merely clerical, and that the board, from the evidence before them, had a perfect right to correct the returns, but in order to reach a proper conclusion it is not necessary for us to so hold.

The decision in the case of *Roemer v. Canvassers* (90 Mich., 27) was made on the 22d day of January, 1892. Subsequently the legislature of the State enacted paragraph 239 of the Compiled Laws of Michigan, 1897, expressly granting to the board of county canvassers the right to call before them the proper witnesses and correct any mistake that was manifest upon the face of the returns.

The statute above quoted gives to the board of county canvassers and the board of election inspectors absolute authority and power to do precisely what they did in this case. It was not shown, and in fact not even claimed, that John M. C. Smith was not credited with every vote that he received in this ward or that the contestant, Claude S. Carney, was not credited with every vote that he received. To vitiate this entire poll on account of the things complained of by the contestant, when such acts were expressly authorized by the statutes of Michigan, and, in the face of the fact that no fraud actually or constructively existed, would be repugnant to our ideas of right and justice.

#### In conclusion the committee summarizes:

It is well settled by the precedents of the House that illegal votes in any poll should be taken from the total vote of the poll proportionately according to the entire vote returned for each candidate. The record does not disclose the votes that were cast for each of the congressional candidates in the precincts where we have found illegal votes, and for that reason and the further reason that it does not affect the result, we have apportioned these illegal votes between the contestant and the contestee in proportion to the votes that each received in the several precincts.

Deducting Mr. Smith's loss from Mr. Carney's loss makes a gain of 7 votes for Mr. Smith, which added to Smith's plurality, conceded to be 116 votes upon the face of the returns after making the correction for the township of Climax, county of Kalamazoo, would give Mr. Smith a majority of 123 votes.

Your committee, therefore, offers for adoption the following resolutions:

*Resolved*, That Claude S. Carney was not elected as a Representative to the Sixty-third Congress from the third congressional district of Michigan; and

*Resolved*, That John M. C. Smith was duly elected as a Representative from the third congressional district of Michigan to the Sixty-third Congress, and is entitled to retain the seat which he now occupies in this House."

On February 6, 1914,<sup>1</sup> the resolutions recommended by the committee were unanimously agreed to without debate or division.

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<sup>1</sup>Journal, p. 195, Record, p. 3050; Moores' Digest, p. 73.

**93. The Michigan election case of MacDonald v. Young in the Sixty-third Congress.**

**Irregularity of nomination does not prejudice claimant's case in the House. It is sufficient if the candidate's name was duly certified as required by law and printed on the ballot at the November election.**

**Irregularity in the manner of nomination should be tested in the courts and under the laws of the State and is not considered by the House.**

**The House is not bound to take cognizance of the manner of nomination, unless fraudulent methods appear to have thwarted the will of the electorate.**

On August 22, 1913,<sup>1</sup> Mr. James D. Post, of Ohio, from the Committee on Elections No. 1, submitted the report in the Michigan case of William J. MacDonald v. H. Olin Young.

The report embodies a sufficient statement of the facts in the case:

The case arises out of the election held on the 5th day of November, 1912, for the election of presidential electors and public officers, including a Representative to Congress from the twelfth district of the State of Michigan.

This district is composed of counties and occupies what is generally known as the Upper Peninsula of the State.

At the election there were four candidates, the contestant, William J. MacDonald, being the candidate upon the National Progressive ticket, and the contestee, Hon. H. Olin Young, was the candidate of the Republican Party for the office of Representative in Congress. In 14 of the counties Mr. MacDonald received 17,975 votes. In one of the counties, Ontonagon, his name appeared upon the ballot as Sheldon William J. MacDonald, and under such designation, he received 458 votes, making a total in the 15 counties of 18,433. Mr. Young received 18,190. The State board of canvassers, composed of the secretary of state, treasurer of state, and commissioner of the land office, canvassed the returns of the district, allowing the contestant 17,975 in the 14 counties and canvassed the vote for Ontonagon County under the name of Sheldon William J. McDonald, thus giving to the contestee upon the face of the returns a plurality of 215 votes, and on the 10th day of December, 1912, issued to him his certificate of election. When the Congress convened in extraordinary session at the beginning of the Sixty-third Congress Mr. Young appeared at the bar of the House, took the oath of office, and served as a Member until the 10th day of May, 1913, when he resigned his seat.

It was generally understood in the district that the contestant had been elected until the 10th day of December, when the State board of canvassers issued the certificate of election to Mr. Young.

When Congress convened in extraordinary session at the beginning of the Sixty-third Congress, Mr. William H. Hinebaugh, of Illinois, objected to the swearing in of Mr. Young and offered a resolution<sup>2</sup> providing for the appointment by the Speaker of a select committee to investigate and report upon his right to a seat in the House. A substitute offered by Mr. John J. Fitzgerald, of New York, directing the administration of the oath forthwith was agreed to and Mr. Young was sworn in.

On May 10, 1913,<sup>3</sup> on motion of Mr. James R. Mann, of Illinois, by unanimous consent, Mr. Young was granted an hour in which to discuss the case, and at the

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<sup>1</sup> First session Sixty-third Congress; House Report No. 60; Record, p. 2640.

<sup>2</sup> Journal, p. 249; Record, p. 65.

<sup>3</sup> Record, p. 1479.

conclusion of his speech announced that he had forwarded to the governor his resignation<sup>1</sup> as a Member of the House.

The contestee both in his answer and in debate in the House admitted the facts as set forth in the contestant's notice of contest, but charged irregularity in the nomination of the contestant through noncompliance with the primary laws of the State of Michigan, and submitted that votes cast for Sheldon William J. MacDonald could not be canvassed or counted for the contestant, as no evidence was admissible under the election laws of the State of Michigan to determine the intention of the voter.

Following the contestee's resignation the committee took evidence and heard arguments.

On the question of irregularity of nomination the committee found:

Whether the nomination of Rogers was regular and in conformity with the primary act, or whether the congressional committee was regularly formed, we do not deem fatal to contestant's claim to a seat. It is sufficient to say that the contestant's name was duly certified as required by the general laws of the State of Michigan to the election boards of the several counties, and by them printed upon the official ballot for the use of the voters at the November election. This certification took place as early as the 11th day of October, and the certificate was made a matter of public record in each county in the district. No objections were made in any county in the district by Mr. Young, any elector of the district, any officer of any political party, or by any of the election officials to the manner in which Mr. Rogers, or Mr. MacDonald had been nominated, until four days prior to the 5th day of November, the date of the general election. The contestee, who was more vitally interested than any other person, by telegram to all of the boards of election commissioners in the district requested that Mr. MacDonald's name remain upon the ballots as they were printed and in his circular invoked the rule of the people. His desires in this regard were respected by the election officials in every voting precinct in the district, with the exception as shown by evidence, in one voting precinct the election officers pasted blank paper over the name of the contestant, thus depriving him of the Progressive votes in that precinct.

The primary act provides that any candidate, feeling aggrieved on account of fraud or error by the board of primary election inspectors, or in the count of the votes cast, or returns made by the board, may file a petition to correct any error or fraud complained of, and that the board of election inspectors may correct any fraud practiced, or irregularity in the election. This is a remedial statute and if the manner of the nomination of Joseph M. Rogers was irregular or fraudulent, its provisions should have been invoked at the proper time. In addition to this your committee finds that the courts of the State of Michigan had the inherent right and power if the name of William J. MacDonald was not entitled to be printed upon the ballots for the use of the voters at the general election, to have corrected such irregularity, and that recourse should have been had to the courts if complaint was to be made prior to the existence of the right of suffrage by the electors of the district.

The committee further found:

It is not claimed that the nomination of Rogers, his resignation, and the filling of the vacancy with the name of the contestant, or with the formation of the congressional committee who selected the contestant to fill the vacancy caused by Rogers, were fraudulent. It is only contended that it was irregular and not in strict conformity to the primary act of the State of Michigan. By a long line of unquestioned precedents established by the House it is not bound to take cognizance of the manner in which a candidate for Congress is nominated, unless the methods employed are unfair or fraudulent and have resulted in thwarting the will of the electorate. Objections made by the contestee to the manner and form of the nomination of the contestant are highly technical,

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<sup>1</sup>Journal, p. 150; Record, p. 1569.

and if enforced by the House would result in the disfranchisement of not only the 458 votes cast in Ontonagon County, but of the 17,975 votes cast in the remainder of the district.

We believe that if the contestee or any elector in the district were dissatisfied with the manner in which contestant's name appeared upon the official ballot such dissatisfaction should have been exemplified prior to the general November election; that it would be exceedingly unfair and inequitable to wait until after the voters had made their choice between the candidates, and if not then satisfactory, to urge objections. But we believe the nomination of Rogers and the formation of the congressional committee were regular and legal under the provisions of the primary act

**94. The case of MacDonald v. Young, continued.**

**Enrollment as a member of one party does not preclude election by another.**

**In determining an election case the House is not limited to the powers of a court of law but possesses all the functions of a court of equity.**

**The House may go behind the ballot to ascertain the intention of the voter, State statutes to the contrary notwithstanding.**

**Where clearly demonstrated that voters were misled by typographical errors in the ballot, the intention of the voter was taken into consideration by the House.**

**While not obliged to consider any issue not specifically raised in the pleadings, the House may do so if the integrity of the election appears thereby to be conserved.**

**The House has the undoubted right to refuse to seat a person violating the corrupt practices act or practicing methods in any other way violative of law.**

**Violations of laws merely directory, as failure to comply with technical requirements within time specified, while subject to extreme penalties, may be disregarded by the House under extenuating circumstances.**

**Failure to file with the Clerk of the House before and after election affidavits required by law held not to justify vacating seat.**

**Sitting Member having resigned, the House did not regard it necessary formally to pass upon the question of his election.**

**Application of the corrupt practices act.**

**As to election by one party while enrolled with another:**

The contention that votes cast for the contestant because at the time of the primary election and at the time of the general election he was enrolled as a Republican can not be counted for him is wholly untenable. No evidence whatever was introduced even tending to show that the persons who voted for him were not qualified electors of the district. So far as the evidence discloses the election was fair and honest, and the votes cast were by honest electors, and the election was regularly and legally conducted. The claim that he was disqualified from receiving votes upon the National Progressive ticket when he was enrolled as a Republican imposes a qualification upon a Member of Congress not sanctioned by the Constitution of the United States or by the constitution of the State of Michigan.

Section 5, Article I, of the Federal Constitution provides that the House shall be the judge of the election returns and qualifications of its own Members.

Section 2, Article I, provides that the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature; and that a Member of Congress shall be 25 years of age, 7 years a citizen of the United States, and an inhabitant of the State in which he shall be chosen. The constitution of Michigan, article 6, section 1, provides

that in all elections every male inhabitant of the State a citizen of the United States, 21 years of age, a resident of the State for 6 months, the township or ward for 20 days, shall be an elector and entitled to vote.

Section 5, article 5, of the constitution of the State of Michigan provides that the qualifications of a representative to the State legislature are that he shall be a citizen of the United States and a qualified elector of the district he represents.

As the contestant at the time of the general November election, 1912, possessed all the qualifications required by the Constitution of the United States and the constitution of the State of Michigan, to superadd a new qualification would be to deny to the House the right to be the judge of the qualifications, election and returns of its Members.

The provisions in the primary act to the effect that votes cast for a person not enrolled as a member of the party casting such votes are applicable only to the primary election held in accordance with the terms of its provisions, and if its provisions relate to the general November election it superadds a qualification to those embraced in the Constitution of the United States. Mr. Justice Story, in his Commentaries, volume 2, page 101, lays down the doctrine "that the States can exercise no powers whatsoever which exclusively spring out of the existence of the National Government which the Constitution does not delegate to them.

"They have just as much right, and no more, to prescribe new qualifications for a Representative as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by States."

If the ballots cast for him at the election were void, it could only be so upon the theory that by the statutory and adjudged law of the State he was ineligible to receive votes cast by Progressive electors and ineligible to be a candidate for the office, because enrolled as a Republican. In other words, it was contended such enrollment disqualified him from receiving votes on Progressive ballots, and for that reason 18,443 votes of the district should be disfranchised. Such a contention is unsound. If the laws of the State of Michigan lead to such results, then it is absolutely certain that they superadd a qualification to a Member of Congress not contemplated by the Federal or State Constitutions.

In this connection the committee define the constitutional powers of the House in the adjudication of election cases:

"It being conceded that the votes cast for the contestant were cast by honest voters and qualified electors of the district, and such votes were intended to be cast for the contestant, then the case should not be decided upon any technicalities arising in the manner or form in which he was nominated. The House should not confine itself to such narrow limits. It possesses the power of a court, having full jurisdiction to try the question, Who was elected? and is not limited to the powers of a court of law, but clearly possesses all the functions of a court of equity, which, in a forum governed by broad equitable rules, would justify a verdict in my favor." The committee unanimously concur with contestee in these views.

The powers of the House in this respect when in conflict with State laws:

(4) The 458 votes cast for the contestant in Ontonagon County should be counted for him. The evidence is uncontradicted that the word "Sheldon" was placed before his name in that county through a mistake pure and simple. The recipient of the telegram from the secretary of the National Progressive committee to the clerk of the board of election commissioners misinterpreted the telegraphic characters for the word "spelled" to mean the word "Sheldon," and in transcribing the name made it Sheldon William J. McDonald. This fact is conceded by all. Is the House powerless to correct this mistake? Notwithstanding the fact that it is the settled law of the State of Michigan that the intention of the voter can be determined only from the face of the ballot, the House can go behind the ballot to ascertain the intention of the voter; it may consider the circumstances surrounding the election; it can determine who were the candidates; whether there were other persons of the same name residing in the district who were candidates; whether the ballot was printed perfectly or imperfectly; and if imperfectly, how it came to be so printed.

Knowing how the word "Sheldon" became prefixed upon the printed ballot before the name of the contestant, and it being conceded that 458 of such ballots were intended for him, it would be eminently unjust or unfair not to grant him the benefit of such votes.

The contestee did not raise the issue of the contestant's failure to comply with the statutory requirements in the filing of statements of campaign contributions and expenses, but the subject was strongly stressed by others in debate in the House and during the hearings before the committee.

Accordingly the committee in their report unanimously agree:

Evidence was taken showing that the contestant failed to file with the Clerk of the House, as provided by law, prior to the general election held on November 5, 1912, an affidavit setting forth the source or sources of moneys contributed to his campaign fund, and also failed to file, as provided by law, an affidavit touching election contributions and expenses within 30 days following the general election.

No issue was made in the pleadings upon this subject, and the precedents are numerous to the effect that no issue having been raised upon it the committee is not bound to give the subject consideration. However, your committee feel that in the investigation of a contested-election case where facts are disclosed that might have a bearing upon the right of a Member to his seat, whether these facts be advanced by any of the parties to the controversy or not, it is proper for the committee to investigate the same and to come to some conclusion thereon. Moreover, it is important that the House take full notice of the compliance with the law looking to the purification of elections. In view of this, your committee has given full consideration to the question raised.

The correctness of these statements touching the facts has not been questioned. Your committee finds, however, that on the 21st day of April, 1913, contestant filed an affidavit with the Clerk of the House showing that he had incurred no election expenses required by law to be reported subsequent to the filing of his statement before the election on October 26, 1912. Contestant also filed an affidavit with the Clerk of the House on April 24, 1913, setting forth that during the month of October, 1912, he received a contribution to his campaign fund in the amount of \$300 through George P. Shiras on behalf of the National Progressive Party.

The House has repeatedly affirmed its right to consider the eligibility of a person presenting himself as a Member elect to the House of Representatives from the standpoint of the manner in which his campaign for election has been conducted under the corrupt practices acts, and the House has the undoubted right to refuse to seat a person presenting himself for membership for violation of the law.

In this case, however, it does not appear that the failure of contestant to comply with the law was willful or on account of ulterior purposes. The money contributed was not an unreasonable amount and was from a source that was legitimate, and the failure of contestant to file an affidavit within 30 days following the election, as is provided by law, when, as a matter of fact, no expenses had been incurred subsequent to the affidavit filed on October 26, 1912, can not have been to avoid the disclosure that such an affidavit might reveal. The delinquency of contestant lies solely in his failure to comply with the law within the time required.

In view of this the committee feels that while the Congress must retain the principle of reserving to itself the right to seat, or refuse to seat, a person presenting himself as a Member elect, on account of his conduct in attaining his election, in this instance the failure to comply with the law, as has been disclosed, carries with it nothing of opprobrium, and your committee can not recommend that contestant be denied his seat on account of his failure to comply with the technical provisions of the law.

In conclusion the committee recommend:

We can not fail to recognize the frank and honorable manner in which Hon. H. Olin Young has conducted himself with relation to the pending contest, nor fail to approve his candor in reaching a conclusion touching the question of his own election which prompted him to tender his resignation to the House of Representatives on May 10, 1913. In view of this waiver of any rights that contestee may have had in the contest, the committee does not regard it necessary to present

for the consideration of the House a separate resolution bearing upon the question of the election of Mr. Young.

The committee, therefore, offers for adoption the following resolution:

*Resolved*, That William J. MacDonald was duly elected a Representative from the twelfth congressional district of Michigan to the Sixty-third Congress and is entitled to a seat therein."

The report was debated at length on August 26, 1913,<sup>1</sup> when the House unani- mously agreed to the resolution.

Thereupon Mr. MacDonald appeared and took the oath.

**95. The North Carolina election case of Britt v. Weaver in the Sixty- fifth Congress.**

**Discussion of the distinction between directory and mandatory elec- tion laws.**

**Instance wherein the House overruled the report of the majority of the elections committee.**

**Committee resolutions based on the counting of ballots failing to comply with statutory requirements were rejected by the House.**

On February 21, 1919,<sup>2</sup> Mr. Walter A. Watson, of Virginia, from the Committee on Elections No. 3, submitted the report of the majority of the committee in the North Carolina case of James J. Britt v. Zebulon Weaver.

The majority and minority reports in this case differ sharply as to what is the real question at issue.

The majority report that the official returns in the case were:

|                |        |
|----------------|--------|
| Weaver .....   | 18,023 |
| Britt .....    | 18,014 |
|                | 9      |
| Majority ..... |        |

The contestant claims that if properly ascertained they would have been:

|                |        |
|----------------|--------|
| Britt .....    | 18,008 |
| Weaver .....   | 17,995 |
|                | 13     |
| Majority ..... |        |

and that the difference is occasioned by the counting or the failure to count certain ballots not marked in accordance with directions of the State law. The disposition of these ballots, the majority contend is the one decisive issue in the case.

The minority do not agree with this statement of the issue. According to the minority views submitted by Mr. Cassius C. Dowell, of Iowa, the county boards met in each of the 13 counties of the district November 9, 1916, and the vote was on that date counted and certified in each county, with the single exception of Buncombe County. The returns as certified in the 12 counties other than Buncombe gave the contestant 13,971 votes and the contestee 13,670. In Buncombe County, according to the minority views, the original returns gave the contestant 4,037 votes and the contestee 4,325, aggregating a total return for the district of 18,008 votes for the contestant and 17,995 votes for the contestee, a majority of 13 voters in favor of the contestant.

<sup>1</sup> Journal p. 253; Record, p. 3780; Moores' Digest, p. 63.

<sup>2</sup> Third session Sixty-fifth Congress, House Report No. 1115, Record, p. 3936.

The minority claim, however, that when the canvassing board of Buncombe County met on November 9, instead of completing its work as in the other counties of the district, it adjourned from time to time until November 17, when amended and supplemental returns were brought in from five precincts in Buncombe County, which were secured by adding to the official returns from the five precincts certain ballots not marked in accordance with the directions of the State law. These unmarked ballots, the minority allege, were originally rejected but later counted for the purpose of overcoming the 13 majority which had been received by the contestant in the district. The question at issue, then, as propounded by the minority is whether or not the evidence in the case is sufficient to overcome the original returns.

The State law of North Carolina referred to by both majority and minority follows:

That opposite the name of each candidate on the general ticket to be voted at the general election shall be a small square, and a vote for any candidate shall be indicated by making a cross mark thus (X) in such square, and no voter shall vote for more than one candidate for any office; but there shall also be a large circle opposite the names of each party's candidates on each ticket and printed instructions on said ticket that a vote in such large circle will be a vote for each and all of the candidates for the various offices of the political party the names of whose candidates are opposite said large circle; and if a voter at the general election indicates by a cross mark in such large circle his purpose to vote the straight or entire ticket of any particular party, his vote shall be counted for all the candidates of such party for the offices for which they are candidates, respectively, as indicated on such ticket.

The congressional ballots distributed under the law and used at the election were in the following form:

For the Democratic Party:

DEMOCRATIC CONGRESSIONAL BALLOT.  
(To vote this ticket make a cross mark (X) in the square.)  
For Representative in 65th Congress,  
Tenth District,  
 ZEBULON WEAVER.

For the Republican Party:

REPUBLICAN CONGRESSIONAL BALLOT.  
(To vote this ticket make a cross (X) in the square.)  
For Representative in 65th Congress,  
Tenth District.  
 JAMES J. BRITT.

The evidence tends to show that some 90 electors cast their ballots in the election without marking a cross in the square opposite the candidate's name as provided by the statute. The decision of the case lies in the acceptance or rejection of these ballots. A majority of them apparently were cast for the sitting Member, and if they are counted his majority is conclusive; if rejected, the majority is transferred to the contestant. The acceptance or rejection of the ballots turns upon the construction of the section of the statute quoted. If mandatory, the failure of the voter to place a mark in the square would invalidate the ballot; if merely directory, his failure to follow the statute would not deprive him of his vote.

The majority thus discuss the distinction between mandatory and directory election laws:

It is hard to lay down any precise rule of construction so as to determine in every case what provisions of a statute are mandatory and which directory; but it is easy to gather from the legal text writers and from court decision what the general principle is applicable to the case in hand.

Judge Cooley's rule:

"Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. (Constitutional limitations, p. 113, and the following cases from State courts; *Odiorne v. Rand*, 59 N. H., 504; *Pond v. Negus*, 3 Mass. 230; *Holland v. Osgood*, 8 Vt., 275; *Colt v. Eves*, 12 Conn., 243; *People v. Hartwell*, 12 Mich., 508; *Edmonds v. James*, 13 Tax., 52; *People v. Tompkins*, 64 N. Y., 53; *State v. Balti. Comrs.*, 29 Md., 516; *Fry v. Booth*, 19 Ohio, 25; *Slayton v. Halings*, 7 Ind., 144.)"

And relative to the construction of election laws in particular, the same author says:

"Every ballot should be complete in itself and ought not to require extrinsic evidence to enable the election officers to determine the voter's intention. Perfect certainty, however, is not required in these cases. It is sufficient if an examination leaves no reasonable doubt upon the intention, and technical accuracy is not required in any case. The cardinal rule is to give effect to the intention of the voter, wherever it is not left in uncertainty, etc. \* \* \* A great constitutional privilege—the highest under the Government—is not to be taken away on a mere technicality, but the most liberal intendment should be made in support of the elector's action wherever the application of the common-sense rules which are applied in other cases will enable us to understand and render it effective. (*Idem*, pp. 914 and 920.)"

McCrary, some time a representative from Iowa and a leading authority on election cases, laid down this rule:

"The language of the statute construed must be consulted and followed. If the statute expressly declares any part of an act to be essential to the validity of the election, or that its omission shall render an election void, all courts whose duty it is to enforce such statutes must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the state simply provides that certain acts or things shall be done, within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election. \* \* \* The principle is that irregularities which do not tend to affect the results, are not to defeat the will of the majority; the will of the majority is to be respected even when irregularly expressed. (*McCrary on Elections*, pp. 93 and 94; and see to the same effect, *Tucker v. Com. Penn. St. R.* 493.)"

"Where the intention of the voter is clear the ballot will not be rejected for faulty marking by the voter, unless a law undoubtedly mandatory so prescribes," was the rule formulated by Mr. McCall, of Massachusetts, in a very able report from the Elections Committee and adopted by the House of Representatives in the case of *Yost v. Tucker* in the Fifty-fourth Congress.

"Where the intention of the voter was not in doubt the House in the case of *Moss v. Rhea* followed the rule of the Kentucky court and declined to reject a ballot because not marked strictly within the square required by the State ballot law."

In many cases the House has counted ballots rejected by the election officers under an erroneous construction of the law, and reference may be made particularly to the case of *Sessinghaus v. Frost* in the Forty-seventh Congress where this course was pursued.

The Supreme Court of North Carolina in construing the very statute under review said:

"If the matter was properly before us and we had jurisdiction to decide it, we would hold as to the congressional ticket, which has only one name on it, that all unmarked ballots ought to be

counted for the respective candidates, because the purpose of the election is to ascertain the will of the voter, and the marking of the ballot can only serve a useful purpose in ascertaining this will when there are more names than one upon the ballot. (See *Britt v. Board of Canvassers*, 172 N. C., p. 797.)”

#### Applying this construction the majority claim:

Applying the foregoing principles then to the question at issue, we have these facts before us:

The statute nowhere else declares it to be mandatory to mark the ballot in the square, nor pronounces the ballot invalid if not so marked; the marking could serve no purpose in indicating the will of the elector where only one name appeared, as his intention was manifest upon the face of the ballot itself; and lastly the marking of the ballot under such circumstances could not, by any stretch of the imagination, be deemed of the essence of the election or to affect its validity in any way.

For these reasons, therefore, we have no hesitancy in holding that section 32 of the North Carolina primary law of 1915 was not mandatory; but that its provisions were directory only, and that the failure of the voter to comply therewith did not invalidate his ballot. All the unmarked ballots properly cast at the election should have been counted, and it was a mistake of law for the election officers to have excluded them from their official returns.

#### The minority oppose this view and contend:

The language of the above provision of the North Carolina statute is clear, concise, and unequivocal. It is subject to one interpretation, to wit, that a ballot must be marked. It is similar to the provisions of the election laws of nearly every State in the Union, and its purpose is to guard against the very thing which happened in this case, that while the ballot is made plain and easy in order that everyone, regardless of his education, may have an equal opportunity to understand it and vote according to his desires, yet it requires some affirmative act on the part of the voter to express his intention. This act was to place a cross mark in the square in front of the name of the candidate the voter desires to vote for.

The minority of your committee believe that the law of North Carolina, providing for the manner of voting and the manner of marking the ballot is mandatory, and that the ballot should have been marked as provided by this statute, in order to become a legal ballot. This is the general rule laid down by the courts in construing similar statutes. And it is our opinion that the unmarked ballots should not be counted.

We call attention to a few of the cases bearing upon this question.

“Where the law provides that the voter shall indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names or in case he desires to vote for all the candidates of the party, etc.: Held, that this provision is mandatory; the stamping of the square being the only method prescribed by which the voter can indicate his choice. *Parvin v. Wirnberg* (Ind.), 30 N. E. 790.”

From the opinion of the court in this case, on page 791, we quote:

“The doctrine that it is within the power of the legislature to prescribe the manner of holding general elections, and to prescribe the mode in which the electors shall express their choice, is too familiar to call for the citation of authority. In this instance it has declared that the mode by which the elector shall express his choice shall be by stamping certain designated squares on the ballot. There is nothing unreasonable in the requirement, and it is simple and easily understood. Furthermore, if he is illiterate or is in doubt, the law makes ample provision for his aid. If he does not choose to indicate his choice in the manner prescribed by law, he can not complain if his ballot is not counted. (*Kirk v. Rhoads*, 46 Cal. 399.) If we hold this statute to be directory only and not mandatory, we are left entirely without any fixed rule by which the officers of election are to be guided in counting the ballots.”

Under a statute similar to the North Carolina statute, it was held that a ballot on which the names of candidates were written in, but no cross mark made after any of the names, can not be counted for any candidate. (*Riley v. Traynor* (Col.), 140 Pac. 469.)

After quoting the statute, the court, on page 470 says:

There can be no mistaking this language. It requires that in order to designate his choice, the voter must use a cross mark, as the law requires. In this case, no cross mark was used anywhere with reference to any of the candidates for the particular office in question, and the ballots ought not to have been counted."

Under a similar statute requiring the voter to make a cross designating his choice of candidates, it has been held that a failure to comply with this requirement invalidates the ballot. (*Vallier v. Brakke* (S. Dak.), 64 N. W. 180, at 184.)

"The law has prescribed the manner in which an elector may arrange his ticket, and what act he may do to designate the candidates for whom he desires to vote. His act must correspond with his intention, and unless it does the vote can not be counted. The system devised is so simple that a man of sufficient intelligence to know what a circle is, how to make a cross, and left from right, can find no difficulty in making up the ticket he desires to vote. He can have no difficulty in expressing his intention in the manner the law has prescribed. It is not necessary, therefore, to impose upon judges of election or courts the duty of ascertaining the intention of the voter, except in the manner pointed out by the statute, namely, by the marks he has placed upon the ballot in the manner prescribed by law."

Following this construction of the law, there can be no other conclusion but that Contestant Britt was elected and is entitled to his seat.

The minority reported resolutions declaring Mr. Weaver not entitled to the seat, and seating contestant, while the majority reported resolutions declaring the contestant not elected and confirming the title of the sitting Member.

The case was fully debated in the House on March 1.<sup>1</sup>

At the conclusion of the debate Mr. Dowell offered as a substitute for the resolution reported by the majority the resolutions recommended in the minority views. The substitute was agreed to, yeas 182, nays 177, but the usual motion to reconsider offered by Mr. Dowell was carried by a vote of 180 yeas to 177 nays. The question recurring on the substitute it was the second time agreed to, yeas 185, nays 183. The original resolutions as amended by the substitute were then agreed to, yeas 185, nays 182.

Thereupon Mr. Britt appeared and took the oath.

#### **96. The Massachusetts election case of *Tague v. Fitzgerald* in the Sixty-sixth Congress.**

**The affixing of a sticker bearing a candidate's name was held to sufficiently indicate the intent of the voter and the House declined to reject ballots so prepared because not marked with a cross thereafter as required by the State ballot law.**

**Discussion as to domicile of voters.**

**The House declined to count the vote of precincts wherein by fraudulent registration many disqualified persons had been put on the voting lists.**

**The returned Member being unseated by the rejection of fraudulent ballots, the House seated the contestant.**

On October 13, 1919,<sup>2</sup> Mr. Louis B. Goodall, of Maine, from the Committee on Elections No. 2, submitted the report of the majority of the committee in the Massachusetts case of *Peter F. Tague v. John F. Fitzgerald*.

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<sup>1</sup>Journal, p. 272; Record, p. 4777.

<sup>2</sup>First session Sixty-sixth Congress; House Report No. 375; Record, p. 6828.

The facts in the case are sufficiently embodied in the following excerpt from the majority report:

Contestant and contestee were candidates for the Democratic nomination for Member of Congress in the primaries in the September preceding the election. Contestee, on the face of the returns, was declared to have received the nomination, whereupon contestant instituted proceedings to have this result reversed, first before the board of election commissioners of the city of Boston and subsequently before the ballot-law commission of the State of Massachusetts. The validity of contestee's nomination was eventually upheld, but the decision was rendered a few days before election day, too late for contestant to file an independent petition whereby his name could be printed upon the ballots to be used in the general election. The method of voting in Massachusetts is by the voter making a cross after the name of the candidate of his choice where it appears on the ballot. Where the name of the voter's choice is not printed on the ballot, he is permitted to write the name thereon or affix thereto a sticker bearing the name of his choice and then marking a cross after the name thus written or affixed. All votes cast for contestant in the election necessarily were of this character. On the face of the returns contestee was declared elected by a plurality of 238 votes in a total number of 15,293 votes cast for Member of Congress in the entire congressional district.

An incidental question related to the validity of ballots to which stickers had been affixed, but which the voters had failed to mark with a cross, as required by the common law and the statutes of the State of Massachusetts. All members of the committee agreed that the intent of the voter was sufficiently indicated in the application of the sticker, notwithstanding the act of voting had not been completed by the making of a cross thereafter, and all ballots so prepared were counted for the candidate whose name appeared on the sticker.

Various charges of fraud and irregularities were made by the contestant which the committee did not consider necessary to discuss, but the principal question at issue concerned the allegation of colonization and illegal registration in the fourth, eighth, and ninth precincts of the fifth ward of the city of Boston.

The laws of the State of Massachusetts did not provide for an annual personal registration of voters. Names appearing on the registry list were carried subject to the check of a canvass made by police officers on the 1st day of April of each year. Information not under oath furnished the police on this occasion by a member of a household or by an employee of a hotel or lodging house was sufficient to retain a name on the registry list.

From the evidence it appeared that lists were sometimes supplied to the police by clerks of such hotels or lodging houses bearing names of persons as being domiciled there, who, in fact, were not such residents and of whom, subsequently, no trace could be found. After an investigation the majority of the committee reported that fully one-third of the total number of votes cast in the three precincts at this election were fraudulent.

The majority cite the rule established by the House in similar cases to the effect that where precincts or districts are so tainted with fraud and irregularity that a true count of the votes honestly cast is impossible, such precincts or districts must be rejected and the parties to the contest may prove aliunde and receive the benefit of the votes honestly cast for them.

In conformity with this rule the majority find:

Rejecting these three precincts, your committee finds that the contestant, Peter F. Tague, on the face of the returns, without considering the changes made by the committee in its recount of the ballots, received a plurality of 316 votes over the contestee, John F. Fitzgerald. Giving effect to the revision of the count of ballots, your committee finds that contestant had a plurality of 525.

For the reasons assigned, your committee recommends to the House the adoption of the following resolutions:

1. That John F. Fitzgerald was not elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress and is not entitled to retain a seat herein.

2. That Peter F. Tague was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress and is entitled to a seat herein.

This conclusion is combatted vigorously in both minority views submitted in the case.

Minority views, signed by Messrs. James W. Overstreet, of Georgia, and John B. Johnston, of New York, submit:

The action of the committee is indefensible for the reason that hundreds of honest voters are disfranchised on insufficient evidence of illegal registration, whereas if only a few cases were proven conclusively the same result could be obtained.

The contestant in his brief practically admitted that he had not proved his allegation of illegal registration. He claims, however, that because his unsubstantiated allegations were not answered by the persons involved he is excused from proving them. This position is unsound for the reasons:

First. The burden of proof is on the contestant.

Second. There is a presumption that the certified voting lists are correct and in compliance with the law.

Contestant attacks the right of many persons to vote where listed and registered in this district, claiming that they have no legal domicile there.

Every man must have a domicile. It is undisputed that he has a right to choose his domicile. In the case of men having several homes, they have the right to choose any one of them as their domicile. In the case of men moving from place to place, it is clearly their right to choose their domicile, and the question of domicile is a question of intent.

Ward 5 comprises nearly the entire business section of Boston, with its great hotels, docks, and wharves, great banks and warehouses, the two great railroad terminals of Boston, the statehouse, post office, customhouse, city hall, and the county courts. It has a highly diversified population in which are represented all of the European countries, as well as the native Yankee. There are many small hotels and lodging houses. There are a great many places where men only live for a short while, and move from place to place. There are many unfortunate men who are compelled by force of circumstances to live in these cheap places, but who have the right to a domicile and the right to vote. These men can not be disfranchised because they happen to live in a different house or on a different street at election time than they did at the time they were listed by the police.

In Boston, men, in order to vote at election, must be listed where they reside the first week of April. If they are so listed they have the right to vote from such residence if qualified and later registered. (See sec. 14, chap. 835, acts of 1914.)

All of the witnesses stated that they were listed and registered in ward 5 where they lived and nowhere else. Now, if these men live there intending that it shall be their domicile, they cannot be listed elsewhere, and without listing they would not be entitled to vote elsewhere, and would therefore be disfranchised.

Here is the law on this matter:

“SEC. 69. In Boston there shall be a listing board composed of the police commissioner of said city and one member of the board of election commissioners.

“SEC. 70. The listing board shall, within the first seven week days of April in each year, by itself or by police officers subject to the jurisdiction of the police commissioner, visit every building in said city, and after diligent inquiry make true lists, arranged by streets, wards, and voting precincts, and containing as nearly as the board can ascertain, the name, age, occupation, and residence on the first day of April in the current year, and the residence on the first day of April in the preceding year, of every male person twenty years of age or upwards, who is not a pauper in a public institution, residing in said city. Said board shall designate in such lists all buildings used as residences by such male persons in their order on the street where they are located, by giving the number or other definite description of every such building so that it can be readily identified, and shall place opposite the number or other description of every such building the name, age, and occupation of every such male person residing therein on the first day of April in the current year, and his residence on the first day of April in the preceding year.

“The board shall place in the lists made by it, opposite the name of every such male person or woman voter, the name of the inmate, owner or occupant of the building, or the name and residence of any other person, who gives the information relating to such male person or woman voter.”

(Chap. 835. Listing and Registration of Voters in Boston.)

As shown above in the statute the name of the informant must be given to the police, so that this evidence was available to show whether or not these men were bona fide residents.

After quoting authorities in support of this position, the minority continue:

In order to decide that there was illegal registration so as to invalidate any of the contestee's votes, it must be shown either that the men charged were acting in conjunction with the contestee or his friends in fraudulent registration or that the informant or landlord were doing the same. This was not shown in any case.

In conclusion the views submitted the following for the action of the House in lieu of the resolutions offered by the majority of the committee:

In conclusion, we submit that the whole case of the contestant rests on allegations and assertions with no substantial proof and that the misstatements made by him in connection with the ballots justifies us in rejecting his uncorroborated testimony about illegal registration.

We therefore submit for the action of the House the following resolution in lieu of the resolution offered by the majority of the committee:

*Resolved*, That John F. Fitzgerald was duly elected a Member of the House of Representatives from the tenth congressional district of the State of Massachusetts in this Congress, and is entitled to a seat therein.

Mr. Robert Luce, of Massachusetts, in separate views submitted, concurs in opposition to the proposal of the majority to reject the poll of the three precincts, and gives an historical résumé of the action of the House in similar cases:

The question rose in the second contested election case coming before the House. It was in the Second Congress that Gen. James Jackson contested the seat of Gen. Anthony Wayne because of gross frauds in a Georgia district. The House did not hesitate to vote unanimously to unseat Wayne, but when Jackson urged that the seat should be given to him by rejecting the returns of certain counties, the House refused. To be sure it was by a tie vote, the Speaker deciding, and it seems to have been feared that if new evidence were admitted, it might put the House in an awkward position by showing Wayne to have been elected, so that the precedent is not clear, but at any rate the proposal to reject certain polls did not prevail.

In the next Congress, in the case of *Van Rensselaer v. Van Allen*, the committee reported that according to the law of the State of New York the fact that more votes were cast for the petitioner in a town than were returned for him could not, if proved, suffice to set aside the vote of the town, and the decision was in favor of the setting Member.

In the case of *McFarland v. Culpepper*, in 1807, irregularities were proved in three out of five counties, and if the returns from these were thrown out the seat would go to the contestant.

Culpepper alleged that if he had time he could prove irregularities in the other two. The report is directly in point here:

“The committee are of opinion that, even presuming the vote in Moore and Cumberland to have been legally taken, it would be improper to deprive the other three counties of a representation for the fault of their election officers, etc., therefore think it most proper to give the citizens of that district an opportunity to have another election.”

So the seat was vacated.

Ten years later, in the case of *Easton v. Scott*, the committee by throwing out the poll of one township, where 24 votes were east, would have given the seat to Easton, but the House recommitted the report with instructions to the committee to take evidence. At this the committee balked, partly because of the remoteness of the district, which was in the Territory of Missouri, and the expense of collecting testimony. In the end a motion to discharge the committee was amended by a substitute vacating the seat.

Although there were two or three cases where a committee showed itself not averse to rejecting the entire vote of certain precincts, towns, or counties, yet for nearly 70 years after Congress first sat in no instance was the result of an election changed by such a rejection.

Partisanship inflicted the pernicious doctrine on Congress. That may not have been the case with the first instance, where the result was changed by throwing out a precinct, *Otero v. Gallegos*, Thirty-fourth Congress (1856), but this was a Territory of New Mexico case of relatively slight consequence. With *Howard v. Cooper* in the Thirty-seventh Congress (1860), a political use of the expedient clearly began. Brightly characterizes this case as notoriously partisan and entitled to little credit, yet it was to serve as a precedent supposed to justify many questionable findings. At the same session *Blair v. Barrett* was decided by throwing out three precincts; in 1864, in *Knox v. Blair*, the committee rejected a precinct; and in *Washburn v. Voorhees*, in 1866, the committee rejected two precincts.

The device lent itself peculiarly to partisan needs and by this time contested-election cases had become political questions. During a long period after the Civil War the chief reliance of the partisan was the throwing out of entire polls. In one instance the whole city of Charleston was disfranchised; in another the whole city of Norfolk. Now that the fires of partisanship have somewhat died down, it may be admitted that the application of the principle had much to do with determining the Hayes-Tilden contest.

Possibly in many of these instances a just result was reached, even though by dubious means. Yet it is the age-long experience of mankind that it is better to keep within the lines of ordered justice than to disregard its canons for temporary ends.

Mr. Luce then submits that when an election is tainted with fraud the proper remedy is a new election, and urges that the seat be declared vacant.

In the course of the debate on the case in the House on October 23,<sup>1</sup> Mr. Goodall, the Member in charge of the time allotted to the minority, yielded time to Mr. Tague, the contestant.

At the close of the debate Mr. Overstreet withdrew the substitute resolution offered by him, and Mr. Luce offered in lieu thereof the following:

*Resolved*, That neither Peter F. Tague nor John F. Fitzgerald was duly elected a Member of this House from the tenth congressional district of Massachusetts on the 5th day of November, 1918, and that the seat now occupied by the said John F. Fitzgerald be declared vacant.

The substitute was rejected by the House, yeas 46, nays 167. The majority resolutions were then agreed to without division.

Thereupon Mr. Tague appeared and took the oath.

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<sup>1</sup>Journal, p. 528; Record, p. 7381.