SENATE . . . . No. 539

The Commonwealth of Massachusetts

MINORITY REPORT OF THE SPECIAL COMMITTEE ON ELECTIONS (SENATE) ON THE PETITIONS OF JOSEPH B. CLANCY THAT HE BE SEATED AS THE DULY ELECTED SENATOR FROM THE FIRST ESSEX SENATORIAL DISTRICT (SENATE, NOS. 50 AND 408).

The Committee on Elections of the Senate, to whom the petition of Joseph B. Clancy, who contests the seat of Albert Cole, was referred, report "Leave to Withdraw," with two dissenting members of the committee. The dissenting members of the committee respectfully submit the following minority report, in which they set forth their reasons for dissenting from the opinion of the majority of the committee, and also report recommending that a resolution be adopted to request the committee to recount the votes cast in said First Essex Senatorial District.

There were two petitions filed.

Upon the face of the returns made by the Election Commissioners it appeared that the petitioner had a plurality of 267 votes cast by the voters of said district; that after the recount the petitioner was defeated by a majority of five votes. It appeared that approximately 333 votes were lost by the petitioner in Ward 3 the first night of the recount; that the blank ballots were not counted at the recount in Wards 2, 3 and 4 of Lynn, as

required by section 135, chapter 54 of the General Laws, as amended by St. 1933, chapter 270. It is a well-established rule of law in this Commonwealth that the words of the Statute dealing with the counting of the blanks, as far as it concerns the duties of the Election Commissioners, are mandatory.

See *Milton* vs. *Auditor of Commonwealth*, 244 Mass. 93.
McCarthy vs. *Boyden*, 275 Mass. 91, at page 93.

In the case of *Clancy* vs. *Wallace*, Advance Sheets, dated December 18, 1934, pages 2431 to 2439, the Court states that the omission to count the blank ballots did not affect the accuracy of the count of the ballots actually cast for the competing candidates. We respectfully point out that the evidence clearly and definitely indicates that the failure to count the blanks did affect the accuracy of the count of the ballots cast for the competing candidates. We respectfully suggest that the Senate judges as to facts and the law pertaining to the seating of the petitioner, or Albert Cole; and having the facts before us we learned from uncontradicted evidence, and from the official records of the Election Commission of the city of Lynn, that the petitioner received in Ward 3, 3,737 votes and Senator Cole in that ward received 4,108, in the original returns, making a total of votes cast for Senator in that ward of 7,845. In the recount Clancy received in Ward 3, 3,580, and Cole received 4,189 votes, making a total of 7,769; there being a difference, or there being missing, 76 votes. We find 76 less votes for the two senatorial candidates in Ward 3 in the recount than in the original figures at the election. The Chairman of the Election Commission, nor any other person, was able to give the Committee any explanation for the failure to account for those missing votes. It is an admitted fact, and the Chairman of the Election Commission so testified, that many mistakes were made in the original counting of the votes, and many mistakes were made in the recounting of the votes cast for the office of

Senator of the First Essex Senatorial District, and because of the fact that the blanks were not counted, no check-up could be made as to where and how the mistakes were made. In the McElroy-Willis case, it was shown conclusively that one block was counted twice, and one block not counted at all. The McElroy case, which covered only three wards in the city of Lynn out of seven under dispute here, showed differences in the original count and in the recount in practically every one of the precincts. The tallying of the votes was done twenty feet away from the observers, and again in the McElroy case it appeared that in one block there was an entry of 21 instead of 41. In other words, when this matter was submitted to the Supreme Court there was no evidence introduced before that Court, nor does it appear in the agreed statement of facts that the omission or the failure to count the blanks actually did or did not affect the accuracy of the count. If evidence of inaccuracy of the count had been offered to the Supreme Judicial Court, mandamus petition would have been granted.

A great number of witnesses testified before this Committee, all citizens residing in the Senatorial District, men of high caliber; and every one of these witnesses described the excitement, the confusion, commotion, and the effect of the presence of the police officers in the room, and behind the rail where the recount was taking place, which had a marked effect upon the officers and tellers who were tabulating and recounting the votes. That these workers had their attention constantly distracted, and that during all this confusion the Chairman of the Election Committee did not attempt to bring about any semblance of order. Mr. Wallace admitted that even though he had learned that the three men who were tabulating the votes had made a number of mistakes during their first count on the night of the election, he admitted that these same men who were tabulating the votes on that night were tallying and counting the votes at the recount. Both Judge John V. Phelan and Attor-

ney Edward Goldman testified that at a certain table the checkers, at the order of Mr. Wallace, refused to turn back a ballot to examine it again when the observers claimed that it had been credited to Cole instead of Clancy. At no time during the hearings did Mr. Wallace or any other witness deny any of the incidents testified to by witnesses for Mr. Clancy. The strongest statements the attorney for Mr. Cole could elicit from Mr. Wallace were, "I don't remember." "It might have occurred; I have no memory of it."

The majority of the Committee in their report stress the testimony of a witness for Senator Cole, a Mr. Murphy, Clerk of the City Council, of which council Senator Cole is a member. He was acting as a tabulator at one of the recount tables. It is claimed that Mr. Murphy refuted the evidence given by Judge Phelan. The minority carefully examined the testimony given by Mr. Murphy, and we quote: —

Q. And do you recall Justice Phelan making some protest with reference to a ballot with which you had something to do? A. Yes, I do.

Q. And Mr. Wallace was present when this discussion was going on? A. Mr. Wallace was called over, the same as he was on all protested ballots.

Q. And whenever anything happened with reference to the ballots Mr. Wallace was called upon to make a decision, and Mr. Wallace did at that time make some decision as to the protest didn't he? A. Mr. Wallace —

Q. Pardon me, — just answer the question. A. I will answer that in my own way.

Q. I was wondering if he made a decision finally. A. I couldn't tell whether he did on that specific protest or not.

Q. I am going to get to that. At all times when there was a dispute on ballots at your table — a dispute on behalf of Cole, Clancy or some other candidate whose votes were being counted that night — Mr. Wallace was called over for a decision? A. Always, at our table.

Q. And he always made the decision? A. The same decision, yes, one decision covered all.

Q. That is what I mean. It was his decision? A. Yes.

Q. And whatever decision Wallace made it was binding on you, who were doing the work? A. Yes.

Q. And of course, Mr. Murphy, you don't recall on that night any specific decisions made there, do you? A. No.

Q. And you don't recall that night of any specific act, whether it was in favor of Senator Clancy or Senator Cole? A. No.

Q. All you do recall is that there were a great many protests? A. Yes.

Q. And sometimes a great deal of discussion with reference to a protest — Well, I will take back the word "discussion," but arguments for and in behalf of the questions raised by the person who raised the issue. A. No, Mr. Wallace wasn't allowing much argument. He would simply say, "Mark that envelope."

Q. And if he would say, "In my opinion this was Cole's vote," that was the final word with you men? A. Yes, sir.

Q. So that you personally, Mr. Murphy, had nothing to do with deciding a question there? A. No.

Q. Generally speaking there was considerable excitement in the room. A. Quite a little confusion.

Q. And there was more confusion during this recount than at any recounts during the 15 years of your experience? A. Well, I haven't worked at many recounts.

Q. Taking all the recounts you have worked at, would you say there was more confusion at this recount than at the others? A. I think so.

Q. You are clerk of the committee down there? A. Yes, sir.

Q. And is that an appointive job by the Mayor, Mr. Murphy? A. An elective job.

Q. Elected by the City Council? A. Yes, sir.

Q. And, of course, Mr. Cole is one of the City Councillors, — that is, Senator Cole is one of the City Councillors? A. Yes, sir.

The majority report discloses that they found a mistake of 55 votes in favor of Senator Cole. No such evidence was offered, and no ballots were examined by this Committee.

The minority Committee finds that the arbitrary, dictatorial tendency on the part of Chairman Wallace, his total disregard of any protests made to him, the fact that he had accepted the written protests and put them in his pocket without even looking at them, or at any time examining them, would clearly indicate to a reasonably prudent person that the Election Commissioner was either biased, or his actions were such that bias could be construed as a matter of law.

There were 37 protested ballots, which protests were made in writing, naming the ward, precinct and block. These ballots were offered in evidence by Chairman

Wallace as ballots being protested by the petitioner. He testified that these 37 written protests were only a few of many protests which were offered by the petitioner. It is the opinion of the minority Committee that an examination of these 37 protested ballots would disclose that Senator Clancy was elected by a comfortable margin of votes.

Immediately after the hearings opened, a motion was passed by a majority of the Committee voting to recount the votes. This motion, before hearings were actually started, was rescinded upon the principle that in order to justify the Committee in going behind the returns of the election officers there must be some satisfactory preliminary proofs of such substantial facts, or well-founded cause of suspicion as would induce a strong conviction that fraud or mistake prejudicial to the contestant might appear on such examination, and also upon the well-founded principle that the Committee should not grant a recount when the only reason is that the vote is close. It is needless for us to cite cases upon this principle, and if the closeness of the vote was all there was in this case, the minority of the Committee would, without hesitation, join with the majority in reporting "Leave to Withdraw." It is clearly apparent that it is not a case of mere closeness of votes, and even though all of the technical allegations and charges which were actually proven before this Committee, beyond any possible doubt, there still remains the uncontrovertible and undisputable fact that many mistakes were made during that recount; that many votes were cast for Clancy which were, in fact, given to Cole. It is very apparent that the reason for the failure to comply with the Statutes governing recounts, the failure of the Chairman of the Election Commission to consult with the other commissioners, his loose, inconsistent way of counting ballots, mistakes in the tally, failure to count an entire block of votes, the counting of one block twice, the fact that 76 votes are unaccounted for in Ward 3, where the petitioner lost 333 votes in the recount, the Election Commissioner's disregard of the law

governing recounts, and his total disregard as to the rights of the parties and voters are unquestionably satisfactory preliminary proof of such substantial facts and well-grounded causes of suspicion as would induce strong conviction that mistake, prejudicial to the petitioner, might appear upon examination.

In conclusion, we declare that we are utterly unable to find a case in which the Committee of the Senate or the House of Representatives has refused to recount the votes of an election in a senatorial district where there is closeness of the vote such as in this case, where mistakes are admitted, and the fact that it was the most confusing, ill-conducted recount that ever came to our notice.

The citizens of the First Essex Senatorial District are entitled to know who was their duly elected Senator, and as this minority views this matter, this is the only course which would result in justice to all parties concerned, and they therefore recommend the passing of the following resolution: —

Resolved, That the Committee on Elections be and hereby is instructed to send for and recount the ballots cast for Senator in the First Essex Senatorial District at the election held in said District on Tuesday, November 6, 1934, and to report the result of such recount to the Senate of the General Court.

Respectfully submitted,

JOHN S. SULLIVAN.
JAMES P. MEEHAN.