

HOUSE....No. 29.

Commonwealth of Massachusetts.

HOUSE OF REPRESENTATIVES, Feb. 6, 1851.

The Committee on the Judiciary, to whom was referred an order concerning the regulation of elections by ballot, and to whom also was committed the resolve concerning the votes cast at the ninth balloting for United States Senator, with instructions to report thereon, have considered the same, and

R E P O R T

as follows :—

That, in the judgment of your committee, no such conflict in the practical construction and interpretation of the statutes exists, in the different municipalities of the State, as would justify further declaratory enactments on this subject, and that such irregularities as are supposed to exist, are mainly to be attributed to a varied application of established principles to a given state of facts, which the judicial tribunals may rectify, but legislative interference cannot prevent.

The precedent established by the decision of a contested election in the House of Representatives, while it neither abrogates nor restricts the power of reversal inherent in the very nature, constitution and sovereignty of the tribunal which adjudicates, has hardly the force of a legal presumption, when urged to control the action of the tribunal, which is competent, in its

constitutional sphere, to determine not alone what the law *is*, but what it *should be*. Hence, as such decision has, at most, only the force of precedent or presumption in future cases, and never the prerogative of established law, the determination of each case, as it arises, upon its attendant circumstances, is a discharge of the full measure of the duty of the House.

In the case in question, the tacit and silent language of the ballot finds its interpreter in the general intent of the assembly. The order for an election, the assignment thereof, and proceedings thereupon, are expressive of the general intent of the assembly to accomplish the effective purposes of a ballot, of which each member therein, with the requisite qualifications, is presumed to be conversant, ready to adopt its language, conform to its modes of procedure, and accede to the furtherance of its ends. The vote thus deposited by a member, bearing upon it the name of a person who may reasonably be presumed, in the judgment of the assembly, under the laws of the land, to have been selected by the voter as a candidate for the trust, is to be counted as a ballot, unless it shall clearly and unequivocally appear that the member intended to cast a blank. The intent and expression must both concur; or, if he intend a ballot, and express not the language of a ballot, it is a blank; if he intend a blank, and express the language of a ballot, it is a ballot. If the ballot contain the name of a person which, in the judgment of the assembly, may reasonably be presumed to have been intended as the name of a candidate, notwithstanding there is apparent upon the ballot a designation of the individual to some other office, such ballot should be counted, unless the voter has by such designation made it clearly and unequivocally appear that he has expressed his special intent to control the general intent of the assembly. This special intent of the voter to control the general intent of the assembly, must be clearly manifest, in language so unambiguous as to exclude mistake, that he intends it as a blank.

With him is the power. Against him is the presumption that he abides the general intent of the assembly, and adopts the language of the ballot. *Upon* him, therefore, shall be the burden of proof, that he intends to vary or control this presumption. The evidence of this special intent must be explicit, and is not to be favored by intendment.

If the designation of the office upon the ballot, be such as is not then the subject-matter of consideration, then it is clear that the voter did not intend it should avail his candidate *for the office designated*, yet, it then remains equally uncertain as before, whether he intended it as a ballot or a blank, and upon him being the burden to make it clear that he designed to control the intent of the assembly by his special intent, it shall be counted as a vote. In cases of doubtful construction, the vote should be counted, upon the principle that the right of the assembly, no less than the right of the individual, is to have a liberal construction in favor, and not in restriction, of the right of suffrage.

The committee are of opinion that the vote cast for "Robert Rantoul, Jr., for Representative in Congress," should have been counted as a vote for said Rantoul in the ballot for senator; and the committee ask to be discharged from the further consideration of both the order and resolve.

In behalf of the Committee,

N. F. SAFFORD.

