

### Opinion No. 2

#### Legislature—House of Representatives —Election Contests—Salaries.

HELD: The House of Representatives is the sole judge of the qualifications of its members and its decision as to the law and the facts in a contest before it is final, not subject to review by any court.

The rule of law that if a plurality or a majority of the votes are cast for an ineligible candidate at a popular election the candidate receiving the next highest number of votes is not entitled to be declared elected is not binding upon the House of Representatives if it chooses to disregard it.

Quære: If the House of Representatives seats a contestant who did not receive the highest number of votes, will the courts assist the appointee in collecting his salary in a mandamus proceeding against the State Auditor?

Jan. 4, 1933.

Re: Relation to the Contest of  
David Murphy, Jr., v.  
J. E. Sadring.

You have requested my opinion on the following questions:

First, has the House of Representatives the sole power to determine this contest, and, second, in case it was found that J. E. Sadring was lacking the necessary qualifications to hold the office of Representative from Musselshell County has the petitioner, David Murphy, Jr., the right to this seat or would there be a vacancy in the position of such representative? I would conclude as follows:

1. That the House of Representatives is the sole judge of the qualifications of its members and that its decision as to the law and facts in this case is final, not subject to review by any court. (Constitution of Montana, Article V, Sec. 9).

As to the second question, Section 13, Article IX, of the Montana Constitution, provides: "In all elections held by the people under this constitution the person or persons who shall receive the highest number of legal votes shall be declared elected."

This provision has been construed by the Supreme Court of the State of Montana in the case of **Cadle v. Town of Baker**, 51 Mont. 176. On page 185 of this decision the following quotation is found: "While a successful candidate may be deprived of the fruits of his victory by being required to forfeit his office as punishment for wrong doing, we undertake to say that it is beyond the lawmaking power to declare elected to an office anyone who has not received the highest number of legal votes therefor." This case is declaratory of the general rule. It is cited in **L. R. A. 1918C, 1158**. This rule is also approved in **20 C. J. 207**, as follows: "It is a fundamental idea in all republican forms of government that no one can be declared elected and no measure can be declared carried, unless he or it receives a majority or a plurality of the legal votes cast in the election. The fact that a plurality or a majority of the votes are cast for an ineligible candidate at a popular election does not entitle the candidate receiving the next highest number of votes to be declared elected; in such case the electors have failed to make a choice and the election is a nullity." See also: **13 L. R. A. (NS) 1013; 34 L. R. A. (NS) 240**.

While I have cited a decision of the Supreme Court of this state and set forth what is called the majority rule in similar cases, it is undoubtedly true that the House of Representatives is the sole judge of the law as well as of the facts in determining the qualifications and eligibility of its members and that no court will upset the findings of this committee.

Despite the general rule, the House might seat the contestant and he would be legally a member. He might possibly have some difficulty if the auditor declined to pay his salary.

In the case of **State ex rel Cutts v. Hart**, 56 Mont. 571, the office of a member of the State Legislature was filled by the Governor. The Governor had no power to make the appointment, but the Legislature recognized the appointment and seated the appointee. The Auditor would not draw a warrant for his pay and an action was brought to compel him to do so. The court said that it could not review the act of the Legislature, but that the court would

not assist the appointee in collecting his salary in a mandamus proceeding.

It is possible that the court might take a different view of the filling of an office **by the legislature itself** and might hold that a finding of the legislature in favor of the contestant was a conclusive finding that he received the highest number of legal votes.

On the subject of procedure, the legislature is not bound to follow any particular plan. We would recommend a very simple and informal procedure, but one which will give both the contestant and the contestee full opportunity to present evidence. On account of the very short period of time within which you have to act no very long notice can be prescribed.