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C. C. to Hon. Ernest Lundeen, 701 Gl e Bldg.,
Hon. Sherman Child, 1106 Lbr Exch., Mpls.

280E *By re Rutledge - Youngdahl Contest*

January 18, 1927.

The House of Representatives.

The attorney general is in Washington on official business. The department in his absence has had under consideration the request of the house as presented in its resolution adopted January 12, 1927, in regard to the pending contest in the 35th legislative district.

The pertinent facts, as submitted in the report of your committee and ascertained from official records, may be briefly stated.

At the November, 1926, general election Henry B. Rutledge and Emil S. Youngdahl were candidates for the office of representative from this district, which is in Hennepin county. On November 9, 1926, the county canvassing board canvassed the votes cast at the election, pursuant to the provisions of § 476, G.S. 1923, and found that Rutledge had received the highest number of votes and declared him elected. The report of the canvassing board was filed in the office of the county auditor, and the result was officially announced to the secretary of state.

Thereafter and before the legislature convened, Youngdahl instituted a contest by proceedings in the district court of Hennepin county under the provisions of chapter 162, Laws 1919. Pursuant to the provisions of that act, the county

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auditor refrained from issuing a certificate of election to Rutledge. There was a recount and a re-canvass of the vote, but before those proceedings were completed the legislature convened.

It is provided in § 477, G.S.1923, that the county auditor, upon request, shall make for any candidate or voter of his county a certified copy of any statement of votes made by the county canvassing board, upon payment of a prescribed fee.

On January 3, 1927, Rutledge obtained from the county auditor of Hennepin county a certified copy of the statement of votes as reported by the canvassing board with respect to the office of representative from this district, which statement, as here indicated, was to the effect that he had received the highest number of votes and was elected to that office. Pursuant to the provisions of § 28, G.S.1923, at noon on January 4, 1927, the members-elect of the house of representatives met in the house chamber for the purposes of organization. The secretary of state called the legislative districts by number in accordance with the requirements of the statute. When the 35th district was called, Rutledge, claiming to be the member-elect from that district, presented the certified copy of the report of the canvassing board, which was received as his credentials, and he was sworn in and seated as a member of the house without objection.

In the meantime the contest proceedings pending in the district court of Hennepin county had been brought to

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trial, and on January 5, 1927, after the house had been organized and the legislature had convened and Rutledge had been seated as a member, the court made and filed its findings as required by the statute. These findings were to the effect that Youngdahl had received the highest number of votes legally cast at the election for the office in question and that he was entitled to receive the certificate of election. On the same day the county auditor issued a certificate of election to Youngdahl, pursuant to the judgment and direction of the court. On the following day, January 6, Youngdahl presented this certificate to the chief clerk of the house and demanded that he be seated therein as representative of this district in place of Rutledge. Thereafter and within the five days limited by the statute, Rutledge appealed to the supreme court from the judgment of the district court, and the appeal is still pending.

In connection with and following the organization of the house, Rutledge participated in the proceedings thereof and voted upon matters therein pending. After Youngdahl had presented his certificate and requested that he be seated, the matter was referred to a special committee. The committee made its report on January 11, stating the facts, and concluding as follows:

That, upon the foregoing statement of facts, your committee is of the opinion that the determination of the question as to the due issuance of the certificate of election to Emil S. Youngdahl involves a doubtful question of law.

That, in passing upon the question as to the rights of Emil S. Youngdahl, your committee believes that all of the facts hereinbefore set forth must be considered.

The committee, therefore, recommends that the attorney general of the state of Minnesota be requested to render an opinion as to which of these contestants, if either, is entitled to recognition as representing

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the 35th legislative district until the final determination of said contest."

The report of the committee, after being laid over for one day, was adopted on January 12.

On January 13 the house adopted the following resolution:

"Whereas, it appears from the report of the special committee of the house appointed in relation to the matter over who is entitled to be seated as the representative from the 35th legislative district, that there exists a controversy over whether Henry B. Rutledge is entitled to a seat as such representative,

Therefore, be it resolved that it is the sense of the house that said Henry B. Rutledge shall not, and he is hereby forbidden to sit in the house or be recognized as a member thereof until expressly permitted so to do by action of the house."

The following conclusions are announced:

1. The statute relating to the organization of the house contemplates that each member shall submit as his credentials and as evidence of his right to a seat a certificate of election issued by the county auditor of the county in which his election district is situated. It may be that where an election district consists of two counties there is an implied exception to this requirement. The secretary of state, acting in a purely ministerial capacity, may not accept anything other than the required certificate. However, long-continued practice has been to disregard formality and to accept as prima facie sufficient the report of the canvassing board. Rutledge presented himself on the call and was sworn in with the others as a member of the house. He participated in the organization of the

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house and for some days in its subsequent proceedings. He became a de facto member. The question whether his credentials were proper has become moot and is unimportant.

2. The presentation by Youngdahl of the certificate of the county auditor of Hennepin County and his demand that he be received as a member of the house amounted in effect to the initiation of a contest in the house over the right to representation for this district, which the house alone must decide.

3. The constitution (sec.3, art.4) provides that each house shall be the judge of the election, returns, and eligibility of its own members. It follows that it is the constitutional right and duty of the house to determine which of the contesting parties is entitled to membership. In the meantime and while this contest is pending undetermined, the house might, if it saw fit to do so, recognize the right of Rutledge to continue as a member; also, it might exclude him from participation in the proceedings of the house until the contest is determined.

4. In the decision of the contest the house may receive such evidence as it deems proper. It may accept the judgment of the district court of Hennepin county upon the issue which was submitted to the court for its decision, or it may await the decision of the supreme court on the appeal from that judgment. When the judgment of the supreme court is given, the house may accept that, or it may determine the matter for itself upon other evidence, if it desires to do so.

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The contestant is not entitled to be seated as a member of the house pending his contest.

5. In view of the indicated conclusions, the inquiry, whether the certificate of election issued by the county auditor to Youngdahl was prematurely issued because the appeal to the supreme court leaves the matter still undetermined, is unimportant. The real controversy is, which one of these members was elected to represent this district in the house; and this, under the constitution, the house must determine for itself. Obviously, it is not bound by a certificate of election issued pursuant to the direction of the court in the contest proceeding there pending under the provisions of chapter 162, Laws 1919. If the house accepts the judgment of the court, the certificate of election is of no importance. If the house rejects the judgment of the court and determines the contest upon other evidence, the same result follows.

JAMES E. MARKHAM.

Deputy Attorney General.

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