

## Opinion No. 15-1431

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**BY:** FRANK W. CLANCY, Attorney General

**TO:** To the Editor, Santa Fe New Mexican, Santa Fe, N. M.

**As to validity of a law passed by the legislature by a majority of one, such majority being by the vote of a man who had no right to sit in the legislature.**

### OPINION

{\*21} I have seen with interest in newspapers reported opinion of some lawyer or lawyers whose names are not given, to the effect that if any bill were passed by the present house of representatives by a majority of one vote, and if Mr. Chaves from Sierra County should vote with the majority, the validity of the law might be inquired into in the courts and that the result would be the annulment of it upon the ground that it was enacted by the vote of a man who had no right to sit or vote in the legislature.

There is something so plausible about this suggestion that it may unnecessarily alarm people who are interested in seeing that legislation of value to the public is enacted at the present session of the legislature. The idea is not a new one, however, as exactly this proposition was submitted to the Supreme Court of the State of Michigan in 1865, and that court, in an opinion written by Mr. Justice Cooley -- one of the greatest jurists that America has ever produced -- decided that there was nothing in it. The question there presented was that of a two-thirds vote of sixty-seven members of the house of representatives necessary to cause an act to take immediate effect, included several who had not been elected by a majority of legal votes, but who, notwithstanding, were retained in their seats by an adjudication of the House in their favor. After stating the argument by counsel, the court speaks as follows:

"It is a sufficient answer to this argument, that while the constitution has conferred the general judicial power of the State upon the Courts and officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other bodies or officers; and among them is the power to judge of the qualifications, elections and returns of members of the Legislature. The terms employed clearly show that each house, in deciding, acts in a judicial capacity, and there is no clause in the constitution which empowers this, or any other Court, to review their action. The 'general superintending control' which the Supreme Court possesses under section three of article six of the constitution, 'over all inferior courts,' does not extend to the judicial action of the legislative houses in the cases where it has been deemed necessary to confer judicial powers upon them with a view to enable them to perfect their organization and perform their legislative duties. The houses are not 'inferior Courts,' in the sense of the constitution, but, as legislative organizations, are vested with certain powers of final decision, for reasons which are clearly imperative."

{\*22} The same principle is announced in the case of *State vs. Jarrett*, 17 Md. 309; *Lamb vs. Lynd*, 44 Penn. 336, and opinion of Justices, 56 N.H. 570. Of interest in this connection as showing the limits of any judicial inquiry as to legislative acts, are the cases of *Chaves vs. Luna*, 5 N.M. 193, and *Lyons vs. Woods*, 5 N.M. 327, which latter case was affirmed by the Supreme Court of the United States in 153 U.S. 649. In these cases the doctrine was announced that the courts would not go behind the enrolled and signed bills in the office of the Secretary of the Territory, although it was incidentally stated in a quotation from the Michigan case, and approved by the Supreme Court of the United States, that it is the duty of the courts to take notice of the journals of the two houses so as to determine whether all the constitutional requisites to the validity of a statute have been complied with, but that this does not extend to a review of facts as to the election and qualification of the members. The courts under this doctrine, could undoubtedly look to the records of the legislature to ascertain whether those sections of the constitution which require that a bill must be passed by a vote of the majority of the members present, and on the final passage that a vote be taken by yeas and nays and entered on the journal, have been observed.