HISTORY AND LAW OF THE HAYES-TILDEN CONTEST BEFORE THE ELECTORAL COMMISSION, THE FLORIDA CASE

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Preface.

To follow the fortunes, studying the manœuvres, of legal battle between the greatest leaders of the American bar, is of itself an exercise of much delight. When the occasion and the opportunity for the struggle furnish a study of pre-eminent historical value, revealing questions eminently practical to the citizen who would deal intelligently with affairs of government, as well as to the statesman and to the lawyer, the importance of the subject cannot be overestimated. The Hayes-Tilden controversy over the Presidency of the United States for the term beginning March 4, 1877, gave rise to a tribunal known as the Electoral Commission; and when this court came to pass upon the disputed questions affecting the succession, the fierce legal battle which ensued and the treatment of the questions before it by the Commission, furnish an unique chapter thus replete with interest, practical value and human nature.

Advocating the cause of Tilden towered Charles O'Conor, in his day without a peer at the bar of this country—perhaps without an equal abroad. Associated with him were Jeremiah S. Black, once Attorney-General of the United States, learned, skilful and widely known; Lyman Trumbull, long a Republican Senator and an intimate personal friend of Lincoln; Montgomery Blair, an able lawyer and who had been of counsel in the famous Dred Scott Case; the astute Ashbel Green; the distinguished Richard T. Merrick; ex-Judge John A. Campbell, one of the justices who concurred with Chief Justice Taney in the Dred Scott decision, and who wrote several important opinions

while on the Supreme Bench; George Hoadley, and William C. Whitney.

For Hayes in the place of first command appeared the wrinkled, thin face, belying the powerful brain, of William M. Evarts, who had been of counsel for Andrew Johnson in his historic impeachment trial, still more famous since his able connection with the Alabama Case, and fresh from masterful achievements in the Beecher trial. Aligned with him were Stanley Matthews, shortly to be elevated to the Supreme Bench of the United States; Edward M. Stoughton, shrewd and masterful; and Samuel Shellabarger, Mr. Hayes' personal counsel—all of both sides men of learning, consummate skill and wide experience, Whitney then the least known of the number.

The Electoral Commission held its public sessions in the present court room of the United States Supreme Court. Formerly the old Senate chamber, this historical old room in the Capitol in Washington, the scene of many brilliant and profound debates, some notable hearings and the pilot house from which this government has been guided in a degree unequalled from any other source, has been the scene of no case more interesting and none of greater importance to popular government than was that heard by the fifteen distinguished men composing this Commission. Created, January 29, 1877, under peculiar conditions by an act of Congress supported by Democrats and Republicans, carried in the face of an obstinate fight led by giants of both parties, the Commission by vote of the eight Republicans to the seven Democrats, before the fourth of the following March, rendered a decision involving

the most vital questions that can arise in the election of President of the United States.

Americans entertain different views of the value of that famous decision and of the nature of the title resting thereon. Though Hayes' "moral title to the Presidency was always questioned, his legal title was perfect," says Doctor James Ford Rhodes in his recent study of the great controversy. Doctor Rhodes is an eminent and most widely-followed representative of a large class. A similar and representative view is advanced by a correspondent in *The Nation* on March 3, 1881, when he says that the action of the Commission "could not do more than make it decent for" Mr. Hayes to accept the Presidency.

Many others believe that the defect in the Hayes title was *both moral and legal*. These believe that the decision of the majority of the Commission is a blot upon American history—indelible—to be studied that its repetition may be avoided. The Commission, by the express terms of the law creating it and by its own admission, was not a tribunal of last resort, and could render no authoritative announcement of the law; it was to proceed to consider the questions submitted to it "with the same powers, if any, now possessed for that purpose by the two Houses acting separately or together, and, by a majority of votes, decide whether any and what votes from such State are the votes provided for by the Constitution of the United States, and how many and what persons are duly appointed electors in such State, and may therein take into view such petitions, depositions, and other papers, if any, as shall, by the Constitution and now existing law, be competent and pertinent in such consideration." With-

out power or any right to give an authoritative construction either of the law or of the Constitution, it could only measure the facts before it by the *settled law;* the *existing law,* the law as it was at the date of the passage of the bill, constitutional, statutory, the old common law preserved to the States, as admittedly understood or announced by courts of competent jurisdiction being of last resort. So this second class holds that these gave the Commission well-defined *vires*; and that it may be indisputably established that the decision of the Commission passed beyond these limits, and that its pronunciamentoes became as illegal as are those of any person or any tribunal doing acts *ultra vires.*

There is, too, a small third class, steadily growing less as the light of research follows in the wake of the departing party passion and prejudice, who believe that Mr. Hayes enjoyed a title without either moral or legal blemish.

My purpose in writing has been to aid to a clearer view of the historical facts and to assist to the most intelligent grasp of the law, that the powers of the Commission may be understood, enabling the general student to appreciate the merits of the respective views. This monograph aims to gather all the material facts bearing upon the questions before the Commission, so that with a study of the law of the case, the student may form an intelligent opinion, enjoying the play of ability of the great lawyers, and get a clearer view of the practical questions, both of law and of government.

The facts have been carefully and laboriously gathered from the thousands of pages of government publications covering the story of the great controversy. No original source has been left unexplored. In stating

the law I have endeavored to give a correct annunciation of *the law*. I have studiously avoided writing as a lawyer would in preparing his brief; I have meant rather to be judicial, that the settled and undisputed rules of law might at all times be presented.

The legal questions are much the same in each case submitted to the Commission. These questions in any one case comprehended, those which arose in the others are understood. I have selected the Florida Case for testing the legal title of President Hayes, and for an examination of the principles announced as the basis of the decision by the Commission, because the Republican contribution of Florida to Hayes' vote, making possible his success without actual resort to force, presents, of all the ugly record of the disputed Southern States, less moral depravity, thus leaving the mind freer to study upon their merits the questions of law and of government.